Petition

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FORD MOTOR COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER BACK PAY DUE AN EMPLOYMENT DISCRIMINATION CLAIMANT CONTINUES TO ACCRUE AFTER THE CLAIMANT HAS REJECTED AN UNCONDITIONAL JOB OFFER THAT DOES NOT INCLUDE RETROACTIVE SENIORITY OR BACK PAY.

2. WHETHER THE COURT OF APPEALS' AFFIRMANCE OF THE FINDING THAT FORD HAD DISCRIMINATED AGAINST TITLE VII CLAIMANTS ON THE BASIS OF SEX IS CONSISTENT WITH THIS COURT'S DECISION IN *TEXAS DEPT. OF COMMUNITY AFFAIRS v. BURDINE*, ___ U.S. ___, 101 S.CT. 1089 (1981).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Ford Motor Company ("Ford")*, asks this Court to review the March 19, 1981, judgment of the United States Court of Appeals for the Fourth Circuit in the case of *Equal Employment Opportunity Commission v. Ford Motor Company*.

OPINIONS BELOW

The opinion of the court of appeals is reported at 645 F.2d 183 (4th Cir. 1981). That opinion is reproduced in the separate Appendix to this Petition at A-4 – 149.

*Ford has no parent company. Ford reports the following affiliate companies and subsidiaries that are not wholly owned pursuant to Sup. Ct. R. 28.1: Eveleth Taconite Company, Ford Motor Company of Canada, Ltd., Ford Motor Company (Belgium) N.V., Ford Motor Company A/S (Denmark), OY Ford AB (Finland), The Ford Motor Company Aktiebolag (Sweden), Ford Brasil S. A., The Ford Lioho Motor Company, Ltd. (Taiwan), The Toyokogo, Ltd. (Japan)

The Findings of Fact and Conclusions of Law of the District Court for the Western District of North Carolina, dated June 1, 1978, are not officially reported, but are reported at 19 F.E.P. Cases 1288 (W.D.N.C. 1978), and are reproduced in the Appendix at A-152 – 73. The Judgment of the district court, dated May 8, 1979, is unreported, but is reproduced in the Appendix at A-150 – 51.[1]

JURISDICTION

The Fourth Circuit Court of Appeals entered judgment on March 19, 1981. Ford's petition for rehearing and suggestion for rehearing *en banc* was denied on May 18, 1981. This Court has jurisdiction to review the court of appeals' decision by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved in the Peition are reproduced in the Appendix at A-1 – 2. They are sections 703(a), 703(j) and 706(g) of the Civil Rights Act of 1964, as amended, Title VII, 42 U.S.C. § 2000e-2(a), (j), and -5(g).

STATEMENT OF THE CASE

A. *Procedural Background*

Respondent Equal Employment Opportunity Commission ("EEOC") brought suit against Petitioner Ford Motor Company ("Ford"), alleging that Ford had violated Title VII, 42

[1]The Appendix to this petition is cited as "A." Citations to the record below are to the Joint Appendix before the court of appeals. The Joint Appendix is cited as "JA."

U.S.C. § 2000e-2, *et seq.*, in failing to hire several women at its automotive parts warehouse in Charlotte, North Carolina. Judy Gaddis, Rebecca Starr and Zettie Smith were among the claimants alleging sex discrimination. The district court found that Ford had discriminated against Gaddis, Starr, Smith and seven other women and awarded them back pay.

The Fourth Circuit Court of Appeals affirmed the findings of the district court that Ford was liable for gender discrimination in failing to hire Gaddis, Starr, Smith and the seven other claimants and, by a two-to-one vote, upheld the district court's framing of the periods for back pay.

Ford filed a timely petition for rehearing and suggestion for rehearing *en banc,* urging primarily that the court of appeals had erred in holding that, since Ford's unconditional offers of employment to Gaddis and Starr had not provided for retroactive seniority and back pay, the offers had failed to stop the accrual of back pay. In addition, Ford contended that the court of appeals had erroneously imposed on Ford not only the burden of producing evidence to rebut prima facie cases of discrimination, but also the burden, expressly rejected by this Court in *Texas Dept. of Community Affairs v. Burdine*, __U.S.__, 101 S.Ct. 1089 (1981), of proving legitimate reasons for its hiring decisions. The petition for rehearing was denied by a two-to-one vote of the panel that had heard the appeal, and the suggestion for rehearing *en banc* was denied by a four-to-four vote upon a poll of the active judges [A-3].

B. *Facts*

At trial, the district court found that Judy Gaddis and Rebecca Starr had applied for employment at Ford's auto-

motive parts warehouse in Charlotte, North Carolina, on July 21, 1971. Both had recently been laid off by General Motors Corporation, in whose Charlotte parts warehouse they had worked for ten months as "picker-packers," "picking" ordered parts from storage, and "packing" them for shipment. At the time they applied for jobs with Ford, no woman had ever been employed for that type of work in Ford's warehouse. In August 1971, two men, J. A. Blanchard and P. E. Coe, began to work in Ford's warehouse as "picker-packers." Blanchard and Coe applied before Gaddis and Starr, and both men had prior experience as warehouse workers [A-158 – 59].[2] Upon Ford's hiring of Blanchard and Coe, Gaddis wrote to the EEOC, charging that Ford had refused to hire her because of her sex.

In January 1973, both Gaddis and Starr were recalled to work in their former positions in the General Motors warehouse. In July 1973, while the women were still employed by General Motors, a permanent position became available in the Ford warehouse. Ford offered that position first to Gaddis and then to Starr. Both women refused Ford's offer, neither wanting to be the only female employed in the Ford warehouse. At trial they stated, as another reason for rejecting the offers, that they had not wanted to lose their accrued seniority at General Motors. As Judge Walter E. Hoffman observed in his opinion dissenting in part, at the time the women rejected the offers, they did not inform Ford that they were reluctant to lose their seniority as General Motors employees, and they did not request that Ford give them retroactive seniority or back pay

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[2]The procedure by which Blanchard and Coe were selected is described in the text at p. 22, *infra*. Ford introduced evidence about that procedure to rebut any *prima facie* case that Gaddis and Starr might have established.

[A-88–89]. There is no evidence, and it has not been suggested, that the discussion between Ford and the two women involved *any* consideration of retroactive seniority or back pay. Nor is there any evidence that Ford asked either woman to surrender any claim connected with the pending employment discrimination charge.[3]

After rejecting Ford's unconditional offer of the warehouse job, Gaddis and Starr continued to work at the General Motors warehouse through January 25, 1974 [JA 573-74, 642], when General Motors moved its warehouse operations to Atlanta. Gaddis and Starr then lost their General Motors jobs upon declining to be transferred to the Atlanta warehouse. They were unemployed until September 1974, when both women entered nursing school on a part-time basis. Both became full-time nursing students in September 1975.

Upon these facts, the district court concluded that Ford had discriminated against Gaddis and Starr on the basis of sex in failing to hire them in August 1971 and that they were therefore entitled to an award of back pay. The district court specifically held that the period of back pay liability extended beyond the date of their rejection of Ford's offers of employment through December 30, 1977, the date on which the court entered its findings of fact and conclusions of law.

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[3]Neither the court of appeals nor the trial court faulted Ford's offers as conditional in any respect. Likewise, the EEOC acknowledged the unconditional nature of the offer at page 9 of its response to Ford's petition for rehearing.

The evidence at trial concerning Zettie Smith was that she "believed" she had applied for a job with Ford in 1971 [JA 683-84]. She further testified as follows: "I didn't indicate what job I applied for. I just, unless it was something in my line of work or whatever." [JA 690].

Relying on this evidence,which even the court of appeals' majority acknowledged was "not a model of clarity" [A-20], the district court found that Smith had, in June 1971, applied for a job with Ford "in line with her prior experience as a stock handler and shipper in a Charlotte textile plant." [A-157]. The district court concluded that Smith had not been hired in August 1971 because of her sex and awarded back pay for a period ending on December 30, 1977.[4]

C. *The Court of Appeals' Decision*

The Fourth Circuit upheld the district court's conclusion that Ford had discriminated against Gaddis and Starr on the basis of sex, indicating that Ford had not met its "burden of proving" its reasons for not hiring them [A-14]. Then, by a two-to-one vote, the court of appeals approved the district court's conclusion that Ford's *unconditional offers* of employment to the two women had *no effect* on the accrual of back pay. The court of appeals rejected Ford's argument that its job offers must be held to have cut off back pay, saying:

> Under Ford's legal theory, if Gaddis and Starr rejected Ford's offer and stayed at General Motors, they would forego their right to further back pay benefits. On the other hand, if they accepted the job offered by Ford, which they

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[4]The actual earnings of Smith, Gaddis, and Starr during their respective back pay periods were deducted in calculating their awards.

had not held for the previous two years because of Ford's discriminatory hiring policy, they would lose their seniority rights at General Motors.

[A-34].

This failure of Ford to offer retroactive seniority prevents Ford from relying on its offers to Gaddis and Starr.

[A-38].

Judge Walter E. Hoffman, dissenting from this holding, strongly urged that the law, as correctly stated and as held by the National Labor Relations Board and other circuit courts, is as follows:

An unconditional offer of reinstatement that does not demand that the employee surrender his back pay or other claims is enough: the employer need not volunteer back pay or give up his right to defend against those claims.

[A-94 – 95].

The court of appeals' majority also affirmed the district court's finding that Ford had discriminated against Zettie Smith.

Again, Judge Hoffman disagreed:

If [Smith] made out a prima facie case — that she applied, was qualified, and yet was rejected — Ford has rebutted that by articulating a legitimate nondiscriminatory reason explaining why it did not hire her: It did not know she had applied for a warehouse job.

[A-126 – 27].

REASONS FOR GRANTING THE WRIT

The judgment below calls for review by this Court because the back pay principle adopted by the Fourth Circuit revolutionizes the handling of employment discrimination claims. The lower court's holding will affect not only Ford Motor Company, but *all employers* and *all employees*. Review by this Court is particularly necessary because the court of appeals' holding on the back pay issue conflicts with decisions of the National Labor Relations Board and other circuits.[5]

In addition, the writ should be granted because the Fourth Circuit's decision imposed on Ford a burden of proof that this Court expressly rejected in *Texas Dept. of Community Affairs v. Burdine*, ___ U.S. ___, 101 S.Ct. 1089, 1096 (1981).

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[5]This Court previously granted a writ of certiorari in a case presenting, among others, the same issue that Ford raises as the first question presented in this petition. In that case, *Jurinko v. Edwin L. Wiegand Company*, 427 F.2d 1038 (3d Cir.), *vacated*, 414 U.S. 970, 94 S.Ct. 293 (1973), the petitioner questioned whether the lower court had properly held that back pay due a Title VII hiring claimant continued to accrue even after the claimant had rejected a good faith offer of employment without prejudice to the claimant's claims for seniority and back pay. This Court vacated the judgment and remanded the case for consideration in light of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). It thus did not resolve the issue whether such unconditional offers terminate the accrual of back pay. *Jurinko* is further discussed on p. 15, *infra*.

I.

The Decision Below, Because Of Its Far-Reaching Impact On The Handling Of Employment Discrimination Claims, Presents A Question Of Federal Law Of Such Importance That It Should Be Resolved By This Court.

The court of appeals' holding that the rejection of Ford's unconditional offers of employment did not stop the accrual of back pay will fall harshly and unfairly on both employers and employees. The court's holding will govern not only the handling of claims of employment discrimination brought under Title VII,[6] but also the handling of discrimination claims brought under the National Labor Relations Act.[7] As this Court has indicated, the back pay provisions of Title VII and of the National Labor Relations Act should be applied in the same manner, the NLRA back pay provision having served as the express model for the Title VII provision. *Albemarle Paper Company v. Moody*, 422 U.S. 405, 418-22, 95 S.Ct. 2362, 2372-74 (1975). Presumably, the court of appeals' holding would also apply to the calculation of back pay under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*

The court of appeals' holding means that the only way an employer charged with employment discrimination can stop the accrual of potential back pay liability is to combine with its offer to employ the claimant an explicit offer of retroactive

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[6]Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*

[7]National Labor Relations Act, 29 U.S.C. §§ 151-69.

seniority and, apparently, back pay.[8] That holding puts employers charged with employment discrimination in an intolerable situation. An employer will be able to stop the accrual of back pay only by giving the claimant everything the claimant could be awarded if the charge of discrimination were to prevail in court. Thus, to stop the accrual of potential back pay liability, the *employer must surrender any meaningful right to contest* the claimant's allegations, even if they appear to be unfounded. In effect, the court of appeals' holding requires the employer to provide the claimant with a type of job insurance: the claimant would be permitted to reject the employer's offer simply because she preferred her current employment and, if that employment were to end for any reason, the claimant would then be permitted to collect "back pay" from the employer for the period both before the beginning and

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[8]Although the court of appeals did not *expressly* state that the employer must offer back pay as well as retroactive seniority, the court's reasoning unambiguously implies that such an offer of back pay is necessary. First, the court relied on two cases, *Comacho v. Colorado Electronic Technical College, Inc.* 590 F.2d 887 (10th Cir. 1979) (*per curiam*), and *Jurinko v. Edwin L. Wiegand Co., supra* at note 5, which *did* expressly hold that employment discrimination claimants are under no duty to accept an offer without back pay (*Comacho* and *Jurinko* are further discussed *infra*). Moreover, the court's reasoning that Ford's offers of employment without retroactive seniority were inadequate because they failed to "make whole" the claimants, although erroneous in Ford's view, would obviously apply equally to an offer without back pay.

The first district court called upon to apply the court of appeals' holding squarely confirmed this implication:

> It is clear from [*EEOC v. Ford Motor Company*] that a person who has been discriminated against does not have to accept an offer of reemployment where back pay has not been offered.

Saunders v. Hercules, Inc., ____ F. Supp. ____, 25 FEP Cases 885, 889 (W.D. Va. 1981).

after the end of that employment elsewhere. That result would obtain even if, as in the present case, the claimant never requested retroactive seniority or backpay, and no one said anything about it.

Judge Hoffman, who dissented from the court of appeals' decision on this point, urged what would clearly be a more equitable resolution of this question:

> The theory behind an offer of employment, whether under the NLRA or Title VII, is the same: a job comparable to the one denied the applicant — or from which the employee was fired or to which he was refused promotion — must be offered to him, without any encumbering conditions that would force him to give up certain rights. The employee can then accept if he wishes and pursue back pay, seniority, or other rights he believes he was denied, through the courts or administrative agencies. Conversely, that offer does not need to include a surrender by the employer of his right to defend against such claims. If the employee rejects that unconditional offer, his right to back pay is cut off. Here, Gaddis and Starr rejected unconditional offers of the same jobs for which they had applied. Those offers did not need to — and did not — include a grant of back pay or retroactive seniority, but, on the other hand, were not conditioned on the surrender by Gaddis or Starr of their rights to pursue those claims. Indeed, the majority refers to Ford's "unconditional" offer, although it qualifies that by stating that an offer of seniority was a prerequisite. Therefore, the offers were valid and their rejection by Gaddis and Starr cut off back pay and reinstatement rights.

[A-104 – 06].

Besides its manifest unfairness to employers, who are continually faced with the problem how to respond to charges of employment discrimination, the holding is unfair to those employers' employees. If an employer, of its own accord, offers retroactive seniority to a discrimination claimant, those who will be *most harmed* are the *present employees* with accrued seniority. Judge Hoffman emphasized this point in his dissent:

> [To give claimants retroactive seniority] would be unfair to present employees with accrued seniority; probably would create havoc in any employer/employee relations, especially if the company is unionized; and might be in clear violation of the employer-employee contract. *See Meadows v. Ford Motor Company,* 510 F.2d 939, 949 (6th Cir. 1975), *cert. denied,* 425 U.S. 998, 96 S.Ct. 2215 (1976), (". . . where the burden of retroactive pay falls upon the party which violated the law, the burden of retroactive seniority for the determination of layoff would fall directly upon other workers who themselves had no hand in the wrongdoing found by the District Court.")

[A-102–03].

Ford recognizes that courts and the National Labor Relations Board ("Board"), *after finding liability,* certainly have the power to order defendant employers to grant retroactive seniority to claimants illegally discharged or illegally refused initial employment. *See Franks v. Bowman Transportation Company,* 424 U.S. 747, 762, 96 S.Ct. 1251, 1263 (1976). It by no means follows, however, that *employers* should be encouraged, much less required, to do so unilaterally. Involved in the contemplation of any award of retroactive seniority is the balancing of the inevitable harm that would result to present

employees with accrued seniority against the wrong that would be done to the claimant if a valid claim for such retroactive seniority should be denied. That balancing should be done only by a court or the Board. In fact, as a practical matter, an employer who reacts to a charge of discrimination with an offer of retroactive seniority will surely open itself to claims, by present employees, that it has breached the seniority provision of the contract with them. Only if a court or the Board has *ordered* such relief can an employer offer retroactive seniority without incurring this liability to present employees or their union.

Finally, the court of appeals' decision will disadvantage even employment discrimination *claimants* since the decision will impede voluntary, partial resolution of discrimination charges. An employer mindful of the Fourth Circuit's formulation of what a job offer must include to cut off further back pay will be dissuaded from making any offer. That result is contrary to Title VII's policy of encouraging cooperation and voluntary compliance to the greatest possible extent. *See Alexander v. Gardner-Denver Company*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017 (1974).

For these reasons, the Fourth Circuit's holding will, if it is permitted to stand, have an enormous negative impact on the resolution of employment discrimination charges. Thus, the case presents a question of federal law of the utmost importance. That question should be settled by this Court.

II.

The Decision Below Conflicts With Decisions By The National Labor Relations Board And Other Circuits.

The Fourth Circuit found support for its holding that employment discrimination claimants are not obligated to accept job offers that do not include retroactive seniority and back pay in three other circuits, the Tenth Circuit, the Third Circuit and the Fifth Circuit.[9] Every other circuit that has addressed the

[9]It is Ford's view that the Fifth Circuit opinion relied on by the court below is distinguishable from the present case and does not support the Fourth Circuit's holding. In the Fifth Circuit case, *Claiborne v. Illinois Central R.R.*, 583 F.2d 143 (5th Cir. 1978), *cert. denied*, 442 U.S. 934, 99 S.Ct. 2869 (1979), the defendant railroad maintained racially segregated job classifications. Some of the black claimants had accumulated substantial seniority in the "black" jobs. If they had accepted the employer's offer of a position in the more desirable, predominantly "white" classification, they would have been required to sacrifice that seniority. 583 F.2d at 151-53. Thus, to have obtained relief from the employer's discriminatory promotion practices, they would have been forced to suffer *further* effects of the discriminatory job classifications. In light of these facts, the Fifth Circuit chose not to apply a *per se* rule that rejection of the employer's job offer cut off back pay. *Id.* at 153.

In the present case, Ford's job offers to Gaddis and Starr did not require them to expose themselves to any further effects of a discriminatory employment policy. It is true that they would have lost their accrued seniority at General Motors, but that is hardly a circumstance for which Ford should be held responsible. Two Fourth Circuit cases also relied on by the court below, *UTU v. Norfolk & Western Railway*, 532 F.2d 336 (4th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), and *Hairston v. McLean Trucking Co.*, 520 F.2d 226 (4th Cir. 1975), are distinguishable for the same reason as is *Claiborne*.

The court below was apparently led into its erroneous reliance on *Claiborne*, *UTU*, and *Hairston* by confusing the seniority the claimants in those cases had acquired with the defendant employers with the seniority that Gaddis and Starr had acquired with *another* employer.

issue and the National Labor Relations Board are in conflict with the Fourth Circuit's holding.

The Tenth Circuit case that the court below relied on was *Comacho v. Colorado Electronic Technical College, Inc.*, 590 F.2d 887 (10th Cir. 1979) *(per curiam)*. In *Comacho*, the employer had offered to reinstate an employee whom it had illegally discharged on the basis of sex, but did not offer back pay. The employee rejected the offer. The Tenth Circuit concluded that the claimant's rejection of the offer was proper and that the back pay due her continued to accrue following the rejection.

In addition to *Comacho*, the Fourth Circuit relied on the Third Circuit's holding in *Jurinko v. Edwin L. Wiegand Co.*, 477 F.2d 1038 (1973), which had been vacated and remanded by this Court, 414 U.S. 970, 94 S.Ct. 293 (1974), and therefore cannot be considered authoritative.[10] In *Jurinko*, the Third

[10]The entire decision was vacated and remanded by this Court so that it could be reconsidered in light of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). *Edwin L. Wiegand Co. v. Jurinko*, 414 U.S. 970, 94 S.Ct. 293 (1973). The Third Circuit then remanded the case to the district court. *Jurinko v. Edwin L. Wiegand Co.*, 497 F.2d 403, 404 (3d Cir. 1974). The case again went to the Third Circuit upon appeal of the district court's decision. The Third Circuit remanded the case to the district court for a second time, with the observation, "it is true that when this case was first here we held that the plaintiffs should also recover for loss of earnings after they rejected that [offer not including seniority or back pay] and until Wiegand should reemploy them with seniority and back pay. But when the Supreme Court reviewed our decision and remanded the case to us it expressly vacated our ruling on damages." 518 F.2d 1214, 1216 (3d Circ. 1975). No further proceedings in the case are reported.

Jurinko confirms the potential of the Fourth Circuit's decision for impeding voluntary, partial resolution of employment discrimination charges. See text, *ante* at 13. In *Jurinko*, the claimants had refused to accept the employer's unconditional job offers on the express advice of the EEOC. The Fourth Circuit's decision will, of course, encourage the EEOC to give that same advice to future claimants.

Circuit had held that the employer's job offers to the claimants did not succeed in tolling the accrual of back pay because the offers had not included "back seniority or back pay." 477 F.2d at 1047.

Numerous decisions of the National Labor Relations Board are in stark conflict with *Jurinko, Comacho,* and the Fourth Circuit's holding. Most recently, in *Consolidated Freightways,* 253 NLRB No. 137 (January 5, 1981), the Board found explicitly that an employer's failure to include back pay in an otherwise valid offer of reinstatement does not render the offer ineffective for cutting off back pay:

> While a valid offer of reinstatement must be specific, unequivocal and unconditional, refusal to include accrued back pay in an otherwise valid offer of reinstatement does not render the offer inadequate. *The imposition of such a requirement would nullify the right to litigate the lawfulness of the discharge.*

253 NLRB at ____ (emphasis added).

The Board's decision in *Consolidated Freightways* drew on its earlier decision in *Moro Motors Ltd.,* 216 NLRB 192 (1975), in which the Board emphasized the claimant's obligation to raise any questions concerning the terms of the offer. In *Moro Motors,* the Board also indicated that the seniority to be offered the claimant (a discharged employee in that case) was *previously-held* seniority, *not retroactive* seniority accruing from the date of discharge. It follows from *Moro Motors* that, since Gaddis and Starr obviously had no seniority with Ford at the time they applied, Ford had no obligation to make an award of retroactive seniority or back

pay.[11] *See also National Screen Products Co.*, 216 NLRB 192 (1973); *Reliance Clay Products*, 105 NLRB 135 (1953).

The First, Second, Seventh, Eighth, and Ninth Circuits are all in accord with the National Labor Relations Board. The Fourth Circuit's majority opinion does not discuss the line of cases from those circuits that conflicts with the Fourth Circuit's holding. For example, in *National Labor Relations Board v. Harrah's Club*, 403 F.2d 865 (9th Cir. 1968), the Ninth Circuit considered the back pay due an employee who had been the victim of a discriminatory layoff. The employee had rejected an offer of reinstatement on the ground that the offer made no mention of "unconditional reinstatement or back pay." *Id.* at 871. The Ninth Circuit held that the offer had been a valid one and had therefore cut off the accrual of back pay. *Id.* The conflict between *Harrah's Club* and the present case is particularly strong since Gaddis and Starr, unlike the claimant in *Harrah's Club*, failed even to *request* either seniority or back pay, indicating *other* reasons for rejecting the offer. Other Ninth Circuit cases, both before and after *Harrah's Club*, confirm the conflict between the Ninth and the Fourth Circuits. *See, e.g., Polynesian Cultural Center, Inc., v. National Labor Relations Board*, 582 F.2d 467, 475 (9th Cir. 1978); *Bon Hennings Logging Company v. National Labor Relations Board*, 308 F.2d 548, 555-58 (9th Cir. 1962); *National Labor Relations Board v. Ronney & Sons Mfg. Co.*, 206 F.2d 730 (9th Cir. 1953).

[11]Most of the cases cited in the text as conflicting with the Fourth Circuit's decision involve offers to reinstate discriminatorily *discharged* employees. But, as the court of appeals implicitly acknowledged in relying on *Comacho*, which was a discharge case, the same principle governs discriminatory hiring cases.

The First Circuit also follows the rule that an employer's simple, unconditional offer of employment to a discriminatorily discharged employee cuts off back pay. *National Labor Relations Board v. Izzi,* 395 F.2d 241, 244-45 (1st Cir. 1968). In *Izzi,* the court set out in its opinion the terms of the offer of reinstatement. The offer, like Ford's offer to Gaddis and Starr, did not mention back pay or retroactive seniority, and it clearly did not require *waiver* of any claim for back pay or retroactive seniority. It was in this context that the court stated: "Discriminatees, after being asked to return, had a clear way to mitigate damages." 395 F.2d at 245.

In accord with *Harrah's Club* and *Izzi* is the Eighth Circuit's decision in *National Labor Relations Board v. Midwest Hanger Co.,* 550 F.2d 1101 (8th Cir.), *cert. denied,* 434 U.S. 830, 98 S.Ct. 112 (1977). There, the Eighth Circuit held that an employer's job offer did not operate to cut off back pay because the offer was conditional in "other" respects. In so holding, however, the court observed:

> It is clear that had the Company's offer of reinstatement been conditioned solely on its refusal to give back pay, as the Company strenuously argues, then the offer of reinstatement would not have been invalidated.

550 F.2d at 1103-4. *See also Blakely v. Chrysler Corp.,* 407 F. Supp. 1227, 1230 (E.D. Mo. 1975) (finding that the claimant could have accepted the offer of reinstatement without having lost the right to pursue his claims as to back pay), *rev'd on other grounds sub. nom. Chrysler Corp. v. Mann,* 561 F.2d 1282 (8th Cir. 1977), *cert. denied,* 434 U.S. 1039, 98 S.Ct. 778 (1978).

The Fourth Circuit's holding is also irreconcilable with the Seventh Circuit's decision in *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997, 96 S. Ct. 2214 (1976), a Title VII case. There, plaintiff Waters established that he had not been recalled following a layoff because of a racially discriminatory agreement between his employer and his union. The Seventh Circuit determined that his back pay should be calculated as follows:

> It would appear from the record that but for the [discriminatory] agreement, Waters would have been recalled on January 17, 1967 . . . . Waters was tendered reemployment on September 5, 1967, which he declined to accept. In our judgment the discriminatory impact of defendants' June 1966 agreement ended with the tender made to Waters in September. The relevant period for computing damages therefore ranges from January 17, 1967 to September 5, 1967.

Id. at 1321. *See also Patterson v. Youngstown Sheet & Tube Co.*, 475 F. Supp. 344, 355 (N.D. Ind. 1979).

Similarly, in *Kenston Trucking Company, Inc. v. National Labor Relations Board*, 544 F.2d 1165, 1166-67 (2d Cir. 1976), the Second Circuit held that the employer's offer of a job to a discriminatorily discharged employee cut off back pay where there was no substantial evidence that the offer was expressly conditioned on settling the claimant's back pay claim.

The direct conflict between the Fourth Circuit's decision and the decisions of other circuits and of the National Labor Relations Board should be resolved by this Court. This Court's guidance is particularly necessary because of the far-reaching

significance of the issue. The question whether an employer's job offer is adequate to cut off back pay is a frequently recurring one. It is potentially present in *every employment discrimination case* under Title VII, the National Labor Relations Act, and the Age Discrimination in Employment Act. Moreover, the Fourth Circuit's resolution of the question deserves review since it threatens to have a pernicious impact on employers charged with employment discrimination, on all of their employees, and even on discrimination claimants.

III.

The Decision Below Imposed On Ford A Burden Of Proof That This Court Expressly Rejected In *Texas Dept. of Community Affairs v. Burdine*, ___ U.S. ___, 101 S.Ct. 1089 (1981).

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), and its progeny set forth the scheme of proof that is to be applied in Title VII cases involving charges of intentional discriminatory treatment. In *Texas Dept. of Community Affairs v. Burdine*, ___ U.S. ___, 101 S.Ct. 1089 (1981), the most recent case in the *McDonnell Douglas* line, this Court summarized that proof scheme as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this

> burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

___ U.S. at ___, 101 S.Ct. at 1093 (citations omitted).

The *Burdine* opinion, focusing particularly on the second stage in this order of proof, held that a defendant employer rebuts the plaintiff's prima facie showing of intentional discrimination by introducing evidence that "raises a genuine issue of fact as to whether it discriminated against the plaintiff." ___ U.S. at ___, 101 S.Ct. at 1094. The Court emphasized that the burden on the defendant is not one of "proof," but only of "production." ___ U.S. at ___, 101 S.Ct. at 1095. To discharge this production burden, a defendant must "clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." ___ U.S. at ___, 101 S.Ct. at 1094.

In the present case, the Fourth Circuit held that Ford had failed to rebut prima facie cases established by Gaddis, Starr, and Smith. That holding was founded on the following view of Ford's burden:

> Ford had the *burden of proving* a legitimate, nondiscriminatory reason for hiring the . . . men instead of Gaddis, Starr and Smith.

[A-14] (emphasis added).

The court of appeals' express premise that Ford bore a burden of "proof" rather than of "production" is squarely inconsistent with *Burdine* and should therefore be set aside.

In "articulating" its reasons for failing to hire Gaddis and Starr, Ford introduced into evidence the clearly admissible testimony of the warehouse manager who had made the employment decisions in question. The warehouse manager explained that the hiring procedure he followed was to review applications in the chronological order in which they were filed, ending the review once he had identified a sufficient number of qualified applicants. Two male applicants, Blanchard and Coe, had applied before either Gaddis or Starr, and both males appeared qualified because of their previous experience in warehouse operations.[12] In testifying about the qualifications of Blanchard and Coe, the warehouse manager indicated that a comparison of the applications showed that Blanchard and Coe were more experienced than Gaddis and Starr [JA 539]. He emphasized, however, that upon making his hiring decision he had first identified Blanchard and Coe as qualified applicants, and had thus had no occasion to review the later applications of Gaddis and Starr [JA 537-39].

This testimony was not in any substantial dispute. Moreover, Blanchard's and Coe's previous warehouse experience was disclosed on the face of their applications, which also indicated the dates on which the applications had been submitted [JA 1190–91, 1196–97].[13]

---

[12]Blanchard's and Coe's warehouse experience was plainly the type of experience that the district court relied on in finding Gaddis and Starr "qualified." [A-158–59].

[13]Although Ford did urge in its appellate brief that Blanchard and Coe had more experience than Gaddis and Starr, Ford was not obligated to do more, in articulating its reason for its hiring decision, than "show" that the men applied before Gaddis and Starr and were, at least, qualified.

Ford also introduced evidence at trial that Blanchard and Coe had actually been *hired* before Gaddis and Starr applied. As Ford conceded in its appellate brief, however, the evidence was ambiguous. The court of appeals examined at some length the evidence about when Blanchard and Coe had actually been hired, and affirmed the district court's finding against Ford on the issue.

The court of appeals never focused, however, on Ford's explanation that it had hired Blanchard and Coe without comparing them to Gaddis and Starr because the males were prior, qualified applicants. Instead, the court interpreted Ford's evidence concerning the qualifications of Blanchard and Coe as an attempt to show that they had been *chosen* because they were *more qualified* than Gaddis or Starr. The court's analysis appears to assume that it was Ford's burden to *prove* the male applicants had superior qualifications:

> The district court found that Gaddis and Starr were qualified to work for Ford as picker packers, and on this record *it is certainly not clear that Blanchard and Coe were more qualified*.

[A-17] (emphasis added).

The court of appeals' disposal of Ford's rebuttal of Gaddis' and Starr's prima facie case is erroneous and should be vacated for two reasons. First, the court erred in overlooking Ford's evidence that it had hired Blanchard and Coe because they were *prior*, qualified applicants. Second, the court's requirement that Ford had to prove that Blanchard and Coe were "more qualified" cannot stand in light of this Court's holding in *Burdine*:

> The Court of Appeals . . . erred in requiring the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff.
>
> . . . Title VII does not demand that an employer give preferential treatment to minorities or women.

___ U.S. at ___, 101 S.Ct. at 1096 (citations omitted).

The court of appeals' affirmance of the district court's finding in favor of Zettie Smith is similarly erroneous in light of *Burdine*. Ford showed its legitimate reason for failing to hire Smith by eliciting from her, on cross-examination, that it was unclear what job, if any, she had applied for at Ford in 1971 [JA 690]. As Judge Hoffman urged in his dissent on this issue, Ford showed that it could not reasonably be expected to have known that Smith was applying for a warehouse job. The majority apparently rejected Ford's explanation with the assumption that Ford had the burden of *proving* the explanation. Since the court of appeals' imposition of this burden on Ford is directly contrary to this Court's holding in *Burdine*, the affirmance of the award to Smith should be vacated.

CONCLUSION

For the reasons stated above, petitioner requests that its petition for writ of certiorari be granted.

Respectfully submitted,

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Dated: August 14, 1981.

Appendix

Office-Supreme Court, U.S.
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81-300

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FORD MOTOR COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION

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STATUTES INVOLVED

1. Section 703(a) of the Civil Rights Act of 1964, as amended, Title VII, 42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

2. Section 703(j) of the Civil Rights Act of 1964, as amended, Title VII, 42 U.S.C. § 2000e-2(j):

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison

with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

3. Section 706(g) of the Civil Rights Act of 1964, as amended, Title VII, 42 U.S.C. 2000e–5(g):

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

United States Court of Appeals
For the Fourth Circuit

No. 79-1515

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Appellee,*

VERSUS

FORD MOTOR COMPANY, *Appellant.*

No. 79-1516

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Appellant,*

VERSUS

FORD MOTOR COMPANY, *Appellee.*

ORDER

The petition for rehearing of Ford Motor Company and suggestion for rehearing in banc has been submitted to the court. A poll on the suggestion for rehearing in banc was requested, but the suggestion has lost by an equally divided court. Judge Phillips disqualified himself from voting in the poll on the suggestion for rehearing in banc.

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Chief Judge Winter with the concurrence of Judge Butzner. Judge Hoffman (S.U.S.D.J.-EDVa) dissents from the denial of the petition for rehearing.

For the Court,

FILED
MAY 18 1981
U. S. COURT OF APPEALS
FOURTH CIRCUIT

/s/ WILLIAM K. SLATE, II
CLERK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Appellee,

v.

FORD MOTOR COMPANY, Appellant.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Appellant,

v.

FORD MOTOR COMPANY, Appellee.

Nos. 79-1515, 79-1516.

United States Court of Appeals, Fourth Circuit.

Argued June 2, 1980.

Decided March 19, 1981.

John R. Wester and Richard A. Vinroot, Charlotte, N.C. (Fleming, Robinson, Bradshaw & Hinson, P.A., Charlotte, N.C., on brief), for appellant.

Vince J. Blackwood, Equal Employment Opportunity Commission, Washington, D.C. (Leroy D. Clark, Gen. Counsel, Joseph T. Eddins, Associate Counsel, Beatrice Rosenberg, Asst. Gen. Counsel, Equal Employment Opportunity Commission, Washington, D.C., on brief), for appellee.

Before WINTER and BUTZNER, Circuit Judges, and HOFFMAN*, Senior District Judge.

WINTER, Circuit Judge:

The Equal Employment Opportunity Commission (EEOC) brought suit against Ford Motor Company for violating Title VII, 42 U.S.C. § 2000e-2. EEOC alleged that Ford had discriminated against several women in its hiring practices at a parts warehouse in Charlotte, North Carolina. The district court found that Ford had discriminated against ten individual women and awarded them back pay. We affirm, but remand the case to the district court for consideration of additional relief.

I.

Ford operates a parts warehouse in Charlotte. A number of the workers at the warehouse are "picker-packers." These employees fill orders for automotive parts by

*Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

"picking" out ordered parts from storage and "packing" them for delivery. Until 1972 when two women were hired as temporary workers, no woman had ever worked as a picker-packer at the warehouse. Ford did not hire a woman to work as a picker-packer on a permanent basis until 1975.

In 1971, Judy Gaddis applied for employment as a picker-packer at the warehouse. When she did not receive a job, she filed a sex discrimination charge with the EEOC. The EEOC, after unsuccessfully trying to secure an acceptable conciliation agreement, sued Ford under Title VII on behalf of two groups of women. The first group consisted of Gaddis and two others who applied for picker-packer jobs which Ford filled with men in the summer of 1971. The second group consisted of eleven women who applied for a single picker-packer opening in 1973. Again in 1973 Ford had chosen a man, not a woman, to work at the warehouse.

The 1971 woman applicants were Gaddis, Rebecca Starr and Zettie Smith. In response to proof that as of 1971 it had never hired women as picker-packers and proof of a discriminatory hiring policy, Ford attempted to demonstrate that it had not in fact discriminated against women in its hiring practices at the Charlotte warehouse. Further, Ford tried to show that these particular women had not applied before the 1971 openings were filled. The district court rejected Ford's arguments, finding that Ford had followed a discriminatory hiring policy and that the three women had applied prior to the time in 1971 when Ford hired three men.

With the aid of a special master, the district court calculated the back pay due Gaddis, Starr, and Smith. Based upon the employment history of the three men who were hired in 1971,[1] the district court

1. Ford filled four positions with men in August, 1971. One of those positions was created especially for a man, Parks, who

decided that, if the women had been hired in 1971, they would have worked at Ford until the time of trial. The special master thus began the back pay period with the date of the 1971 hirings and ended it at the date of trial in 1977.

With respect to Gaddis and Starr only, Ford attempted to terminate its back pay liability at three different junctures: in 1973 when they were recalled for one year by their former employer General Motors, later in 1973 when they rejected job offers from Ford, and in 1975 when they entered a CETA nurses training program. The district court refused to truncate the back pay periods at any of these points. Further, the district court rejected Ford's request to subtract unem-

transferred from a Ford warehouse in another city. The district court instructed the special master to base the back pay periods of the three women on the employment histories of Blanchard, Coe, and Rogers, the three men hired to fill the other three positions in which vacancies had occurred in the regular course of operations.

ployment compensation from the back pay awards.

In 1973, Ford filled a vacancy by hiring a man, Robert Simpson, even though eleven women had applied for the position. The district court ruled that EEOC proved a prima facie case of sex discrimination, in this instance based upon Ford's hiring procedures. After referral, the special master found that Simpson was hired in part because a warehouse employee took an interest in his application and that Ford did not seriously consider the applications of the eleven women. The special master determined that Ford did not intentionally discriminate against the women when it hired Simpson. But the special master concluded that Ford's practice of hiring new employees on the recommendation of present workers, who were all male, without giving other applications full consideration, had a discriminatory effect upon the women

applicants. The district court accepted the conclusion of the special master.

Pursuant to the district court's instructions, the special master determined the back pay due each of the women who had applied for the 1973 opening. Smith was among the eleven who had applied, but she was not included in the 1973 group because her injury was remedied by the award she received as a member of the 1971 group. Of the remaining ten applicants, seven appeared before the special master and demonstrated their financial injury.[2] Under the district court's directions, the special master divided each woman's award by seven, since the seven women had applied for a single vacancy.

Ford attempted to reduce its back pay liability by arguing that the back pay

2. The seven women were Gloria Gaither, Betty Erwin, Mary Luckey, Frances McGinnis Gantz, Mary Cox, Arlene Brown, and Frankie Benson Grier. Because Mary Luckey had died in the interim, a representative of her estate appeared before the special master.

periods of the seven women should terminate with the end of Simpson's employment at Ford. Simpson was laid off by Ford in 1974. He was not recalled; instead, Ford hired a woman, its first permanent female picker-packer, to fill his job. The special master found, however, that it was Ford's usual practice to recall employees who had been laid off. Therefore, the special master refused to end the back pay period with Simpson's termination, and the district court approved that decision.

The district court granted the two groups of women no additional relief beyond back pay. No mention of additional relief was made in the report of the special master, nor did the district court discuss other remedies in its findings of fact and conclusions of law, its referral order, or its final order.

Finally, the district court ordered

Ford to report in the future about the company's efforts to hire women. The court declined, however, to grant general prospective relief against sex discrimination at the warehouse, due to the vigorous affirmative action program Ford had pursued since 1975.

II.

Because the 1971 openings and the 1973 opening involve different issues, we examine these two incidents of alleged discrimination separately.

A. 1971 Openings

(1) Discrimination

(a) Prima Facie Case

Under Title VII, EEOC bore the burden of establishing a prima facie case that Ford discriminated against Smith, Gaddis, and Starr. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In this case, EEOC

amply fulfilled its obligation.

EEOC showed that Ford had never hired a woman to work in its parts warehouse until 1972, when Gaddis and Starr were hired on a temporary basis, and that Ford hired its first woman permanent employee in 1975. In addition, Gaddis and Starr testified that when they applied in 1971 the receptionist told them that Ford did not hire women to work in the warehouse. Ford disputes this version of the facts and contends that the women were told that Ford "did not have females working [in the warehouse]." This version by itself supports an inference that Ford was discriminating on the basis of sex, but, in any event, the district court chose to believe the testimony of Gaddis and Starr. On these facts, the district court certainly made no clearly erroneous factual findings nor any improper legal

determinations when it decided that EEOC established a prima facie case of sex discrimination by Ford against Gaddis, Starr, and Smith.

Once EEOC proved this prima facie case, Ford had the burden of proving a legitimate, nondiscriminatory reason for hiring the three men instead of Gaddis, Starr, and Smith. Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978) (per curiam); McDonnell Douglas. Ford argues that Gaddis, Starr, and Smith had not applied when it filled the three vacancies and that therefore they were not in reality victims of discrimination as a result of Ford's 1971 hiring decisions.

(b) Rebuttal: Gaddis and Starr

Ford insists that Gaddis and Starr applied a few days after the vacancies had been filled. Instead of Gaddis and Starr,

Ford hired James Blanchard and Phillip Coe. Ford's employment records indicated that Blanchard was hired on August 5 and that Coe was hired on August 16. It is undisputed that Gaddis and Starr applied on July 21. Thus, it would appear that Gaddis and Starr applied before Blanchard and Coe were hired.

Ford's warehouse manager, however, testified that he thought that he hired the two men by phone before July 21, so that they could give their employers notice before joining Ford. The testimony of the two men themselves indicated otherwise. Coe testified that he was hired "only just two or three weeks" before he went to work. Since Coe began work on August 16, according to his testimony he was hired no earlier than July 27, after Gaddis and Starr applied. Blanchard testified that he had been contacted by Miller "a week

or two weeks" before he started his new job on August 5. He, then, was hired no earlier than July 23, also after Gaddis and Starr applied.

The district court, while noting that there was conflicting evidence, concluded that "[a]t least two of the men employed in August—Coe and Blanchard—were offered their jobs after Gaddis and Starr applied" (emphasis in original). Obviously, the district court compared the testimony of the warehouse manager with the testimony of Blanchard and Coe and found the recollections of Blanchard and Coe more persuasive. Credibility determinations are the province of the district judge, and, in light of this evidence, we do not find his conclusions clearly erroneous.[3]

3. Ford also suggests that Blanchard and Coe were more qualified than Gaddis and Starr. Gaddis and Starr had worked as full-time parts pickers at a General Motors parts warehouse. Blanchard had worked for a chain saw manufacturer in

(c) Rebuttal: Smith

Ford challenges Smith's recovery by contending that she did not apply at all during 1971. Smith had originally been considered only as one of the victims of possible discrimination in 1973, because she had applied for a warehouse job in 1973. Before the district court, however, Smith testified that she had also applied for a warehouse job in April and June of 1971. Smith said she applied in 1971 because early in that year her employer had warned its

> a position similar to a picker-packer, and Coe had worked for a Ford dealership.
>
> However, both Blanchard and Coe had recently been high school students and had worked only part-time and during the summers. The district court found that Gaddis and Starr were qualified to work for Ford as picker-packers, and on this record it is certainly not clear that Blanchard and Coe were more qualified.
>
> Moreover, the gravamen of the EEOC complaint is that Gaddis and Starr were not considered for the openings, even though they were qualified, merely because they were women. Ford can hardly defend itself on the basis of relative qualifications

workers that, due to a change in plant ownership, their jobs might not be secure. Smith stated that she applied in April when she began searching for a new job, and in June, during her vacation.

Ford relies on the fact that it found no 1971 application from Smith in its files. Ford's records included only the 1973 application. The absence of a 1971 application carries little weight, however, because Ford routinely discarded applications after the passage of one year.

Further, Ford points to the testimony of its warehouse manager and its receptionist, who stated that Gaddis and Starr, who applied in July, were the first women applicants for warehouse jobs. But, in the face of Smith's testimony concerning her June application and her reasons for applying, the general recollections of

when it never evaluated the qualifications of the women.

the warehouse manager and the receptionist are not particularly persuasive. The district court, after observing all three witnesses, credited Smith's testimony. This credibility determination was for the district court and was not clearly erroneous.[4]

4. Ford claims that it was surprised by Smith's testimony that she had applied in 1971. Smith testified as one of the women who applied in 1973, but mentioned during her testimony that she had applied in 1971. Ford requests a remand so that the district court can conduct a further hearing into Smith's claim.

As explained above, the determination of when Smith first applied was purely a credibility determination. Smith said she applied in 1971. Ford's personnel stated that Gaddis and Starr were the first women to apply for warehouse jobs. Thus, the basic question was whether Smith's story was believable in the face of contrary testimony.

The district court heard Smith's testimony and the testimony of Ford's employees. Ford had ample opportunity to cross-examine Smith. The district court concluded that Smith was telling the truth and that under Ford's employment practices her application was not seriously considered because of her sex. We see no need for further proceedings,

In addition to deciding that Smith applied in 1971, the district court concluded that "although she was qualified to be employed in the warehouse, her application was never seriously considered because she is a woman." Ford suggests that there is no evidence in the record to show that Smith's application was not considered. Contrary to Ford's position, there was sufficient evidence to support the decision of the district court.

since the district court has heard and evaluated the pertinent evidence.

Ford makes one last argument for a remand by contending that Smith stated that she did not specifically request a picker-packer job when she applied at the warehouse. As Ford points out, during her testimony Smith stated, "I didn't indicate what job I applied for." But, as Ford fails to mention, Smith immediately continued, "I just, unless it was something in my line of work or whatever." Ford's attorney then asked, "Your line of work was what?" Smith replied, "Stockroom or shipping or something like that."

Smith's testimony is not a model of clarity. But she indicated that she

EEOC showed that Ford never hired women as permanent employees until 1975 and that Gaddis and Starr had been told in 1971 that Ford did not hire women to work in the warehouse. Based on these two compelling pieces of proof, the district judge could reasonably infer that Smith's application, like the applications of Gaddis and Starr, did not receive serious consideration because of her sex. We cannot say that this factual determination was clearly erroneous.[5]

applied for a job in her line of work, which was stockroom or shipping work. The job at the warehouse which obviously fitted to her description was the picker-packer job. The district judge, who heard Smith's testimony and observed her demeanor during cross-examination, found that she applied for a warehouse job. Based on Smith's testimony, which Ford itself developed on cross-examination, that finding is not clearly erroneous. Here, again, there is no need for a remand.

5. Ford argues that the district court placed an impermissibly heavy burden upon it. According to Ford, the district court required it to "establish" or

(2) Back Pay

In order to remedy the effects of discrimination against Gaddis, Starr, and Smith, the district court awarded them back pay. With the help of a special master, following the direction of this court in UTU v. Norfolk & Western Railway, 532 F.2d 336, 341 (4 Cir. 1975), cert. denied, 425 U.S. 934, 96 S.Ct. 1664, 48 L.Ed.2d 175 (1976), the court constructed the hypothetical work histories which the three women would have had at Ford if they had not been

prove that it had not discriminated against the three women. Keene State, Ford contends, requires only that it "articulate" a legitimate nondiscriminatory reason for choosing the men instead of Gaddis, Starr, and White.

In this case, Ford neither "articulated" nor "established" a legitimate nondiscriminatory reason for hiring the men, since the district court found that the facts did not coincide with Ford's representations. Ford insisted that the other women had not applied when the men were hired. The district court determined the truth to be that the women had applied beforehand. In this situation, Ford was left with no defense to the prima facie case of discrimination.

victims of discrimination. The court then used these hypothetical work histories to calculate back pay. The district court determined that if the women had been hired in 1971, they would have been working at Ford at the time of trial in 1977, as were two of the men who were hired in 1971. Accordingly, the court granted the women back pay from the time the men were hired in 1971 through 1977.

Ford urges that the back pay periods of Gaddis and Starr should have been terminated at three different points short of the date of trial. In addition, Ford insists that the awards of all three women should be reduced by the amount of unemployment compensation they received during the period.

(a) Subsequent Recall

Before Gaddis and Starr applied for the Ford warehouse jobs, they had worked in

similar positions for General Motors. In 1971 Gaddis and Starr applied for work at the Ford warehouse because they had been laid off from their General Motors jobs. In January, 1973, Gaddis and Starr were recalled to General Motors. They worked at General Motors for approximately one year and were then laid off for a final time.

The district court subtracted their earnings at General Motors from their back pay awards. Ford insists that the district court should have gone further. Ford contends that the back pay period of Gaddis and Starr should have been terminated when they rejoined General Motors.

Ford's argument misses the point of a Title VII back pay award. Under Title VII, a district court awards back pay in order to put the discrimination victim in the position she would have occupied if the

defendant had not discriminated against her. Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). Pursuant to this purpose, the district court constructed the claimants' hypothetical employment histories, calculated what they would have earned if they had not been victims of discrimination, subtracted what they actually earned during the period, and awarded the difference in back pay. We prescribed this formula in UTU, 532 F.2d at 341, because it makes the discrimination victim whole while denying her a double recovery. If the back pay period ended when a discrimination victim obtained substantially equivalent temporary employment, as Ford suggests, the discrimination victim would not be made whole, because her back pay period would be shorter than her hypothetical work history. Ford's proposed rule is

thus contrary to the intent of Title VII, since it does not fully compensate the discrimination victim.

Moreover, the procedure followed by the district court is completely in accord with the statute. In 42 U.S.C. § 2000e-5(g), Congress provided: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." Thus, the statute requires only that interim earnings be deducted from the back pay award, the very procedure implemented by the district court; but it does not require, as Ford urges, that the back pay period end when a discrimination victim accepts other temporary employment. The back pay period may continue past the acceptance of another job by a discrimination victim, as long as the victim's earnings are subtracted

from the back pay award.

In this case, the district court properly found that the hypothetical employment histories of the women would extend beyond their employment at General Motors. The two men who were hired instead of Gaddis and Starr worked until the time of trial. Unlike the women, who were unable to continue at General Motors, the two male Ford workers were steadily employed from 1971 until 1977. Thus, if Ford had hired Gaddis and Starr in 1971, in all probability they would have worked until 1977.[6]

Ford also argues that the result reached by the district court is contrary to the

6. Ford submits that this focus on the work histories of the men who were actually hired is punitive. But the best evidence of the female applicants' probable work histories at Ford was the work histories of the men who held the 1971 positions. By constructing the hypothetical work histories of the women through reliance on the work histories of the men, the district court acted only to compensate the discrimination victims, not to punish Ford.

method followed by the National Labor Relations Board under the National Labor Relations Act, 29 U.S.C. § 160. Ford contends that the NLRB has implemented a rule of ending back pay periods when a discrimination victim obtains substantially equivalent employment, even if the discrimination victim is subsequently laid off.

In fact, the approach under the NLRA is identical to the approach adopted by the district court. In NLRB v. Mastro Plastics Corp. 354 F.2d 170 (2 Cir. 1965), cert. denied, 384 U.S. 972, 86 S.Ct. 1862, 16 L.Ed.2d 682 (1966),[7] the guilty employer

7. See note 11, infra. Furthermore, the back pay formula employed by the district court in this case is the back pay formula used under the NLRA. The Board estimates the back pay the discrimination victim would have earned but for the discrimination and subtracts actual earnings to determine the back pay award. NLRB v. Gullett Gin Co., 340 U.S. 361, 71 S.Ct. 337, 95 L.Ed. 337 (1951); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 61 S.Ct. 845, 85

made the same argument advanced by Ford. Both the Board and the court rejected the employer's position. The court explained:

> Several discriminatees secured substantially equivalent employment or became self-employed during the back pay period and yet suffered additional losses thereafter. Mastro argues that the taking of such employment terminates completely its back pay obligation. We do not agree. The only issue here is whether the discriminatee willfully incurred a loss of earnings. It would be unjust

L.Ed. 1271 (1941); F. W. Woolworth Co., 90 NLRB 289 (1950).

We also note that the NLRB decisions cited by Ford are inapposite to this case. In Circle Bindery, Inc., 232 NLRB 1185, 1187-88 (1977), the Board terminated the back pay period when the discrimination victim accepted permanent employment, but because the discrimination victim would have left the temporary job from which he had been discriminatorily discharged when he accepted the permanent job. Thus, the acceptance of the permanent job marked the end of his hypothetical work history for the temporary employer. In Star Baby Co., 140 NLRB 678, 683-84 (1963), the Board ended the back pay periods when the discrimination victims found permanent employment, but did not address the problem faced in the instant case. Star Baby was complicated by the fact that the employer had gone out of business.

> to require him to mitigate his damages to the greatest extent possible but then to penalize him for substantial but short-lived success. Unless in taking substantially equivalent or self-employment the discriminatee willfully forwent greater earnings, his back pay should not be reduced beyond the interim earnings he in fact received.

Id. at 179.

This passage highlights the central weakness of Ford's argument. If the back pay period ended completely when a discrimination victim accepted substantially equivalent employment, then a discrimination victim would be discouraged from mitigating damages. She could accept equivalent employment only by forfeiting continued back pay rights, with the risk that her new job might end and leave her without income from any source. Many discrimination victims might choose unemployment and continuing back pay over employment which might be short-lived. Title VII,

like the NLRA, should be interpreted so as to encourage mitigation of damages by discrimination victims in order to reduce the back pay liability of Title VII defendants would be ill-served by a rule which encouraged discrimination victims to remain idle.[8]

Therefore, by refusing to terminate the back pay period when Gaddis and Starr returned to General Motors, the district court furthered two policies underlying Title VII. It made Gaddis and Starr whole, by awarding them back pay during their entire hypothetical work histories at

8. Of course, if a discrimination victim accepts permanent employment with substantially equivalent wages and remains at that job, the back pay period would end when she accepted the permanent job, because thereafter she would suffer no damages. Her actual earnings from that point on would be equal to or more than what she would have earned if she had not been a victim of discrimination. See Butta v. Anne Arundel County, 473 F.Supp. 83, 89 (D.Md. 1979); Milton v. Bell Laboratories, Inc., 428 F.Supp.

Ford. At the same time, the district court followed a rule which induces Title VII discrimination victims to mitigate damages. Without reservation, we affirm the district court's decision.

(b) Job Offers

Later in 1973, while Gaddis and Starr were working at General Motors, Ford offered a permanent warehouse job to Gaddis. She declined the offer. Then Ford offered the job to Starr, who likewise declined. Ford asserts that its back pay liability cannot extend past the time when Gaddis and Starr turned down the offers.

The district court found that one principal reason why Gaddis and Starr rejected

502, 515 & n. 19 (D.N.J. 1977). In this case, however, Gaddis and Starr were unable to remain at General Motors, because they were once again laid off after working for about a year. They thus suffered additional damages during the period following their layoff from General Motors, a period when they would probably have been employed if Ford had not discriminated against them in 1971.

Ford's offer was because they would have been forced to abandon their seniority at General Motors. By accepting a job with Ford and leaving General Motors, Gaddis and Starr would have forfeited all their rights at General Motors. Ford's offer did not include retroactive seniority to the time of the 1971 hirings. Ford presented Gaddis and Starr with an offer of mere beginning employment.

We have twice held under Title VII that victims of discrimination need not accept job offers which include a loss of seniority in order to preserve their back pay rights. In UTU, 532 F.2d at 340, we explained:

> A refusal to commit seniority suicide is not an acceptable reason to deny back pay. Victims of discrimination should not be required to forfeit wage and security benefits accruing because of their seniority in order to remain eligible for purely speculative future back pay relief. A general rule requiring such action would frustrate the central purposes of Title VII.

Accord, Hairston v. McLean Trucking Co., 520 F.2d 226, 232 (4 Cir. 1975) (plaintiff's refusal of promotion or transfer because of a discriminatory loss of seniority is not a defense to plaintiff's back pay claim).

Ford would present Gaddis and Starr with a similarly intolerable choice. Under Ford's legal theory, if Gaddis and Starr rejected Ford's offer and stayed at General Motors, they would forego their rights to further back pay benefits. On the other hand, if they accepted the job offered by Ford, which they had not held for the previous two years because of Ford's discriminatory hiring policy, they would lose their seniority rights at General Motors. Thus, Ford's job offer was tainted by the effects of the discrimination it had practiced in 1971. Gaddis and Starr could accept the offer only by

forfeiting the seniority they had accumulated at General Motors and without a compensating offer of seniority at Ford to alleviate the effects of the discrimination against them in 1971. As in Hairston and UTU, the result advocated by Ford would "frustrate the central purposes of Title VII."

Our decision is in accord with the decisions of three other circuits. In Comacho v. Colorado Electronic Technical College, Inc., 590 F.2d 887 (10 Cir. 1979) (per curiam), a woman sued a college under Title VII for discriminatorily firing her. She prevailed and was awarded back pay. The college argued that her right to back pay was terminated when the college made her an offer of reinstatement. The Tenth Circuit replied:

> 42 U.S.C. § 2000e-5(g) ... gives the trial court discretion as to the remedies. The obvious purpose of the Act is to compensate persons for injuries suffered

> on account of unlawful discrimination. Congress clearly intended that the remedies employed would "make whole" as nearly as possible any person injured under the Act.... An offer of reinstatement without back pay does not "make whole" the person injured by an illegal firing. Such a holding would circumvent the objectives of Title VII. The college thus did not offer to fully compensate plaintiff, but merely offered to reemploy her.... Thus we must hold that a reinstatement offer without back pay does not relieve a guilty employer from further liability.

Id. at 889.

In Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3 Cir.), vacated on other grounds, 414 U.S. 970, 94 S.Ct. 293, 38 L.Ed.2d 214 (1973), the district court held that discrimination against the plaintiffs ceased when they were offered jobs by the defendant. The Third Circuit rejected this portion of the district court's opinion, stating:

> The terms of the 1969 job offers were within Wiegand's control, and it did not offer the plaintiffs back seniority or back pay. The offer that was made did not rectify the effects of its past

> discrimination, and the plaintiffs were under no duty to accept such an offer.

Id. at 1047.

Similarly, in Claiborne v. Illinois Central Railroad, 583 F.2d 143, 153 (5 Cir. 1978), cert. denied, 442 U.S. 934, 99 S.Ct. 2869, 61 L.Ed.2d 303 (1979), the Fifth Circuit held that: "Failure to accept an offer of reinstatement in a Title VII case does not necessarily terminate the right to relief, so long as those amounts earned elsewhere or earnable with reasonable diligence are deducted from each plaintiff's award." Furthermore, the Fifth Circuit explained that "the disadvantages to an employee returning to the railroad without retroactive seniority" would "more than justify" an employee's decision to refuse an offer of reinstatement. Thus, the Fifth Circuit, like the Third and the Tenth, would find, as we do, that

Ford's job offers to Gaddis and Starr did not end their back pay periods.[9]

9. Ford points to several NLRA decisions in which the NLRB has held that an offer of reinstatement terminates an employer's back pay liability to a discriminatorily discharged employee. E.g., D'Armigene, Inc., 148 NLRB 2 (1964), enf'd as modified, 353 F.2d 406 (2 Cir. 1965). For several reasons we do not find these decisions persuasive.

The decisions cited by Ford discuss offers of reinstatement. In the instant case, Ford did not make the women offers of reinstatement, but only offers of beginning employment. An offer of reinstatement carries with it seniority rights, whereas an offer of beginning employment includes no seniority rights. This failure of Ford to offer retroactive seniority prevents Ford from relying on its offers to Gaddis and Starr.

In fact, our decision in this case is consistent with at least one decision of the NLRB. See note 11 infra. In NLRB v. Hilton Mobile Homes, 387 F.2d 7 (8 Cir. 1967), the employer offered a discharged employee reinstatement, but without seniority rights. The Board held that this offer did not terminate the company's back pay liability because the offer did not include seniority. The court agreed and enforced the Board's order. The offer in the instant case is almost identical to the offer in Hilton Mobile Homes, but significantly different from the offer of reinstatement

Further, it should be noted that Ford was benefited by the employment of Gaddis and Starr at General Motors. Their earnings at General Motors were deducted in the calculation of their back pay awards. Gaddis and Starr reduced Ford's back pay liability by working at General Motors.

In sum, the district court reached an eminently reasonable result. It did not permit Ford to cut off the back pay period by making Gaddis and Starr an incomplete and unacceptable offer, and it denied Gaddis and Starr a double recovery by

addressed in D'Armigene.

Also, Gaddis and Starr mitigated damages. In some situations, refusal of an offer of employment or reinstatement might amount to a failure to mitigate damages, and, under 42 U.S.C. § 2000e-5(g), the discrimination victim's recovery might be reduced by the amount of wages she could have earned in the offered job, as "amounts earnable with reasonable diligence." In the case of Gaddis and Starr, they reduced Ford's liability by continuing to work at General Motors.

deducting their General Motors wages from their back pay awards. We affirm this aspect of the district court's decision.[10]

(c) Nurses Training

In September, 1975, Gaddis and Starr entered a nurses training program, a CETA program for the unemployed. Ford asked the district court to terminate the back pay period of Gaddis and Starr upon their entry into the program. The district court refused. Instead, the court accepted the special master's report which treated the training program as employment and

10. In addition to its finding that the women did not want to lose their General Motors seniority, the district court found that neither Gaddis nor Starr wanted to be the only woman employed at the warehouse. In fact, Ford's warehouse manager testified that he warned Gaddis and Starr that they might be subject to sexual harassment if they worked at the warehouse. He told them that "they may very well [be] subjected to passes, offensive remarks, off-color language" and that "there are not now nor, ... have there ever been women working in the warehouse."

reduced the back pay awards by forty hours of minimum wage earnings for each week the women spent in the program.

On appeal, Ford again presses the argument that its back pay liability should not extend beyond the date when Gaddis and Starr entered the nurses training program. We think that there are four reasons why Ford should not prevail.

First of all, Gaddis and Starr did not remove themselves from the labor market

> Incredibly, Ford tries to rely upon the discriminatory atmosphere of the warehouse to argue that Gaddis and Starr unreasonably rejected Ford's job offers. It would be ironic indeed if Ford could defeat the remedial purposes of Title VII by resting upon sexual harassment of women in its warehouse. Ford cannot escape the fact that its offer included no seniority rights to make Gaddis and Starr whole.
>
> We note further that the warehouse manager told Gaddis and Starr that if Ford hired one of them, it would hire the other to avoid subjecting a lone woman to sexual harassment. In 1973, Ford offered a single position to each of the women. It did not offer positions to both.

when they entered the CETA program. Both testified that they would have accepted work had it been offered to them. The special master's report credited their testimony. He found that the two women had not removed themselves from the labor market, and his finding was adopted by the district court. Because this determination was a reasonable credibility determination, we cannot treat it as clearly erroneous.

Two courts have decided similar cases in which Title VII claimants entered school after suffering discrimination at the hands of an employer. Those courts have decided that the critical determination is whether the claimant remained "ready, willing, and available" for employment. Taylor v. Safeway Stores, Inc., 524 F.2d 263, 267 (10 Cir. 1975); United States v. Wood, Wire & Metal Lathers Local 46, 328

F.Supp. 429, 439, 443-44 (S.D.N.Y. 1971). If the claimant is ready, willing, and available for work, these courts have suggested, the back pay period does not come to a close when the claimant enters school.

The district court in this case followed the rationale of these cases by instructing the special master to ascertain whether Gaddis and Starr had removed themselves from the labor market. We conclude that the district court acted correctly in ordering the special master to examine the availability of these two particular women for work, rather than mechanically ending the back pay period upon their entry into the CETA training program. The "ready, willing, and able" test followed by the district court permits the relief in each case to be fitted to fit the circumstances of particular claimants.

Second, the CETA training program closely resembled employment. Both women received the minimum wage for the time they spent in the training program. Both testified that they regarded the program as employment. Indeed, the apparent intent of the CETA program is to provide the unemployed with work while at the same time preparing them for future employment.

The special master treated the training program as employment like the claimants' temporary employment at General Motors. As with the wages the women earned at General Motors, the special master subtracted the wages the women earned in the training program from Ford's back pay liability. 42 U.S.C. § 2000e-5(g). In addition, the district court took every precaution to insure that Ford was not unfairly burdened by back pay liability. Even though Gaddis and Starr sometimes

attended the program for less than forty hours per week, the district court subtracted forty hours of earnings for each week they spent in the program. In this fashion, the district court properly treated the nurses training program as the equivalent of employment and also guaranteed that Gaddis and Starr did not receive more than one full recovery.

Third, Gaddis and Starr were enrolled in the program as a result of their presence on the unemployment compensation rolls. Gaddis and Starr were receiving unemployment compensation when they began the training program. Both testified that they did not sign up for the CETA program on their own and that they enrolled at the urging of the state unemployment compensation office. In fact, a representative of the state agency testified that their unemployment benefits would have

been cancelled if they had not enrolled in the CETA program. As the special master found, "[T]his course of action was recommended very strongly by the North Carolina Employment Security Commission."

Gaddis and Starr were unemployed as a direct result of the discrimination against them by Ford. As the employment histories of the men hired in 1971 demonstrate, if Ford had not discriminated against Gaddis and Starr in 1971, they probably would not have been receiving unemployment compensation. But for Ford's discriminatory hiring practices, they would have had no need of a CETA program. However, because they were unable to find work and because they were a burden on the state unemployment compensation fund, Gaddis and Starr were convinced by the state to enroll in the CETA training program. Ford cannot equitably be relieved of Title VII back pay

liability because of an event which flowed directly from its discriminatory actions. The district court reached the proper result when it refused to terminate Ford's back pay liability upon the entry of Gaddis and Starr into the CETA training program.

Fourth, as has been detailed above, the district court did not abuse its discretion, see Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), when it chose not to end these claimants' back pay period with their enrollment in the nurses training program. As the Tenth Circuit indicated in Taylor, 524 F.2d at 268, district courts have discretion to examine the particulars of a claimant's entry into school and to decide whether the employer's back pay liability should end or continue. In this case, the enrollment of Gaddis and Starr into nurses training is colored by

several facts, including their availability for work, the similarity between the CETA program and employment, and the close connection between the state unemployment compensation agency and the CETA training program. When all these factors are considered, it is apparent that the district court did not abuse its discretion when it permitted Ford's back pay liability to continue during the training program, while giving Ford credit for the claimants' possible minimum wage earnings during the period.

(d) Unemployment Compensation

Ford argues that the awards of all three women should be reduced by the amount of unemployment compensation they received during the back pay period. The district court did not deduct unemployment compensation from the back pay awards. We conclude that the district court ruled cor-

rectly.

There is a division of authority over the deduction of unemployment compensation from Title VII back pay awards. Some district courts have subtracted unemployment compensation in computing back pay. See, e. g., Heelan v. Johns-Manville Corp., 451 F.Supp 1382 (D.Colo. 1978).

On the other hand, one district court in this circuit has decided that monies received as "state unemployment compensation 'are made to carry out an independent social policy' and are not deductible from a back pay award under Title VII." Abron v. Black & Decker Manufacturing Co., 439 F.Supp. 1095, 1115 (D.Md.1977), quoting Inda v. United Air Line, Inc., 405 F.Supp. 426 (N.D.Calif.1975) aff'd in part and vacated in part, 565 F.2d 554 (9 Cir. 1977), cert. denied, 435 U.S. 1007,

98 S.Ct. 1877, 56 L.Ed.2d 388 (1978). See also Tidwell v. American Oil Co., 332 F. Supp. 424 (D.Utah 1971).

In an analogous context, the Supreme Court has decided that unemployment compensation need not be deducted from back pay awarded under the NLRA. NLRB v. Gullett Gin Co., 340 U.S. 361, 71 S.Ct. 337, 95 L.Ed. 337 (1951). The Supreme Court's analysis is particularly convincing:

> ... To decline to deduct state unemployment compensation benefits in computing back pay is not to make the employees more than whole, as contended by respondent. Since no consideration has been given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received.
>
> ... Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation

> of respondent, but to carry out a policy of social betterment for the benefit of the entire state. [citations omitted]. We think these facts plainly show the benefits to be collateral. It is thus apparent from what we have already said that failure to take them into account in ordering back pay does not make the employees more than "whole" as that phrase has been understood and applied.

Id. at 364, 71 S.Ct. at 339 (emphasis in original).[11]

Based on the Abron decision, the analysis of the Supreme Court, and the remedial policies of Title VII, we agree with the district court that "awards of back pay under Title VII should not be affected by a system of compensation which is designed to serve a wholly independent social policy." To decide otherwise would undercut to some degree the corrective

11. This decision is particularly persuasive, because Congress turned to the "make whole" provisions of the NLRA when it framed the relief provisions of Title VII. Albemarle Paper Co., 422 U.S. at 419-22, 95 S.Ct. at 2372-73.

force of a Title VII back pay award.

(3) Conclusion

Many of Ford's objections contest the factual findings and credibility determinations of the district court and the special master. Because we find none of them clearly erroneous, we do not overturn any of these resolutions of conflicting facts and testimony. Most of the rest of Ford's contentions challenge the district court's exercise of discretion in framing a remedy. As indicated above, we find that the district court did not abuse its discretion but, on the contrary, closely examined each issue to determine an equitable adjustment of Ford's back pay liability. Consequently, we affirm the district court's decision with respect to Gaddis, Starr, and Smith.

B. 1973 Opening

(1) Discrimination

In 1973, Ford hired Roger Simpson to fill a single vacancy at the warehouse. Ford passed over eleven women who had applied for the job. In its order of reference to the special master, the district court found that EEOC had established a prima facie case of discrimination against the eleven. Upon referral, while the special master concluded that Ford did not act with discriminatory intent when it hired Simpson, he did conclude that Ford had acted pursuant to a pattern or practice of discrimination. The district court approved the special master's report. Ford raises several challenges to the court's conclusion that it discriminated against the eleven female applicants.

(a) Disparate Impact or Disparate Treatment

First, Ford argues that this case from the beginning has been a disparate treatment case founded on an allegation that Ford intentionally discriminated against the eleven women. Because of this assumption, Ford insists that the special master in effect ruled that EEOC had failed to set forth a prima facie case, by finding that Ford acted with no discriminatory intent when it passed over the eleven women.

It is true that the Title VII case against Ford with respect to the 1971 openings was founded on a disparate treatment theory. The district court found that as of 1971 Ford followed vague and subjective hiring criteria, and that Ford's personnel stated that Ford did not hire women to work in the warehouse. And, under McDonnell

Douglas, Ford failed to articulate a legitimate nondiscriminatory reason for its decision to hire three men to fill the 1971 vacancies. The district court thus uncovered discriminatory intent behind the 1971 hirings.

The district court's Title VII ruling with respect to the 1973 opening, however, was grounded on a finding of disparate impact, not disparate treatment. When it referred the case to the special master, the district court found that "the plaintiff [had] established a prima facie case of discrimination" as to the eleven women. The special master interpreted this language as a fnding of disparate impact rather than disparate treatment, and accordingly ruled against Ford because of its finding that Ford's employment policies resulted in a pattern or practice of discrimination against the eleven women.

In its order approving the special master's report, the district court responded to the argument Ford makes here and confirmed that the special master correctly interpreted the referral order. The district court explained that its order contained "a finding by the court of a pattern and practice of discrimination against women. This was the correct interpretation of the court's conclusion of law, although the word 'pattern' was not used by the court."

Of course, as the district court perceived, Title VII condemns both intentionally discriminatory employment policies and employment practices which only have a disparate impact on women. Albemarle Paper Co.; Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). As well, in any given case, disparate treatment and disparate impact may

serve as alternative theories upon which a right to relief may be established. Wright v. National Archives & Records Service, 609 F.2d 702, 710-11 (4 Cir. 1979) (in banc).

Consequently, Ford cannot challenge the plaintiff's prima facie case by pointing to the special master's finding of no discriminatory intent. The district court could determine that Ford violated Title VII based upon a disparate impact theory, which does not require a finding of discriminatory intent. Nor can Ford object to the district court's reliance on a disparate impact theory, even if a disparate treatment theory was also considered as a basis for relief in connection with the 1971 openings, the 1973 opening, or both. As we explained in Wright, a district court is free to rely on either theory.

(b) Pattern or Practice

Second, Ford contends that even if this case rests on a finding of disparate impact, EEOC did not establish a prima facie case because it failed to prove a pattern of discrimination. We find, however, that EEOC showed both that Ford's hiring history revealed a pattern of discrimination against women and, whatever the probative force of the statistics, that the employment practice followed by Ford in filling the 1973 opening had a disparate impact upon women.

As of 1973, Ford had never hired a woman to work in its warehouse as a permanent employee. Between 1971 and 1973, Ford had two openings for permanent employees. The first opening was filled by David Martin, whom the district court found was hired because of his qualifications. The second position was offered to Gaddis and

Starr, and Ford urges that these offers demonstrate that Ford was not using a discriminatory employment policy during the period. The district court discovered, however, that the offers were made to Gaddis and Starr only after Ford learned that Gaddis had filed a sex discrimination charge against it with the EEOC. Consequently, these offers are entitled to little weight. Subsequently, Simpson, a man, was hired to fill the position.

EEOC's case is less than totally convincing, because Ford made only one contested employment decision between 1971 and 1973. Nevertheless, this history amounts to a total exclusion of women from permanent employment at the warehouse, except when Ford felt the threat of an EEOC complaint. And, Ford's record of pre-1972 employment discrimination gives these facts more force. Consequently,

while there were few hiring decisions during the period, we think that the district court reasonably inferred from the record a pattern of discrimination against women.

But even if the bare record of Ford's hiring decisions is insufficient, the method Ford used to hire Simpson was clearly an employment practice which had a disparate impact on women. Ford considered applications inactive after six months unless the applicant contacted the warehouse to update his application. Ford did not inform applicants of this policy. Simpson had filed his application in 1971, approximately two years prior to the date Ford hired him in 1973. Simpson had done nothing to update his application. Instead, as the special master found, an employee at the warehouse, who was Simpson's friend, "birddogged" his application.

Simpson was hired, the special master concluded, at least in part to accommodate his friend.

Of the seven women who appeared before the special master, three had applied over six months before the opening was filled and therefore would not have been considered. Under Ford's policy, they were unaware that they had been eliminated by the passage of time and did not benefit from the special treatment Simpson received. The remaining four had applied within six months and therefore should have been considered for the job. Yet, they had no advantage over Simpson even though their applications were current and his had long since been inactive.

It is apparent that Ford's hiring policy had a discriminatory impact upon women applicants. First of all, their applications were subject to the six-months rule,

without their knowledge. Friends of warehouse workers, such as Simpson, had the benefit of assistance from inside the warehouse to keep their applications current. The influence of warehouse employees was critical in the selection of new workers, at least in this instance. Because male workers are likely to recommend their male friends as prospective employees, male applicants were more likely to be hired at the warehouse than female applicants. As the special master found, this informal secret selection process led to "an environment with loose employment procedures" which "operated to perpetuate the status quo—i. e., as all-male warehouse." Ford's hiring habits, then, served to exclude women from the warehouse and foreclosed eleven women from serious considera-

tion for the 1973 vacancy.[12]

The decision of the district court virtually is compelled by our holding in Barnett v. W. T. Grant Co., 518 F.2d 543, 549 (4 Cir. 1975). In that case, the Title VII plaintiff attempted to prove discrimination through statistics, which we found "quite suggestive," if not "overwhelming." As in this case, the plaintiff's proof went beyond statistics:

> In addition to statistics, a court must also examine "patterns, practices, and general policies to ascertain whether racial discrimination exists." [citations omitted]. Word-of-mouth hiring, which

12. Our description in Wright, 609 F.2d at 711, of the disparate impact theory is directly applicable to the path Ford followed to fill its 1973 vacancy:

> Central to proof of a prima facie case under this theory is proof of an employment policy or practice which, though facially neutral or even benign in actual purpose, nevertheless imposes a substantially disproportionate burden upon a claimant's protected group as compared to a favored group within the total set of persons to whom it is applied.

> the district court found to be Grant's primary method of recruiting new [employees], is discriminatory because of its tendency to perpetuate the all-white composition of a work force.

In harmony with Barnett, we find that Ford's informal hiring procedure, which relied heavily on the recommendation of a current employee, was discriminatory because Ford's workforce consisted only of men.

(c) Relative Qualifications

Ford makes one final argument to overturn the decision of the district court. Ford contends in response to this prima facie case that it hired Simpson because he was better qualified than the women applicants. To begin with, the special master found that the women applicants, like Simpson, were qualified to work as picker-packers.[13]

13. Simpson had worked for about three years as a material handler at a printing company. Of the eleven women, four had worked in warehouses for at least two years, including two who had worked in auto parts warehouses; one had worked for over five years as a distribution clerk in a post office; two had worked

All had previous clerical or industrial work experience, ample training for "picking" and "packing;" and thus the special master's finding was not clearly erroneous.

More to the point, as the special master found, the applications of the women did not receive a "fair comparison" with Simpson's because of the recommendation of the male warehouse employee. Simpson was the only applicant who received an interview; even the women who had current applications were not interviewed. The influence of the warehouse employee was thus an important motivating reason for

in textile mills; and one had spent nine years as an assistant manager of a drive-in.

Further, it should be noted that the district court found: "Although Ford contends that similar past experience is an important factor, the speed with which a new employee is expected to learn and usually does learn how to perform his job demonstrates that such past experience is not an essential job qualification."

Simpson's selection. Ford cannot rely on relative qualifications when the recommendation of a warehouse employee played a key role in Simpson's selection and when the female applicant did not receive serious consideration.

(2) Back Pay

The district court awarded the 1973 women applicants back pay. Seven appeared before the special master to prove their damages. Under the instructions of the district court, the special master calculated each woman's back pay and awarded one-seventh of each sum, because Ford only filled one vacancy in 1973. Ford does not contest this aspect of the district court's decision.

Ford does object to the length of the back pay period. After working several months, Simpson was laid off on February 6, 1974. Simpson's recall rights expired by

the time Ford was ready to fill his vacant position. At that time, in September, 1975, Ford did not recall Simpson, but in his place hired Doris Baumgardner, who was Ford's first female permanent picker-packer.

The special master found that in the usual situation Ford recalled laid-off employees, even when their recall rights had expired. Because the hiring of Baumgardner was an unusual case, the special master did not terminate the back pay period with Simpson's layoff. Instead, the special master included Baumgardner's employment within the back pay period for the eleven women.

Ford argues that this extension of the back pay period was improper. According to Ford, "the court was required to track the actual work experience of the employee allegedly favored by Ford's alleged discrim-

ination." Ford's proposed rule is unacceptable because it bears no relation to the purpose of a Title VII back pay award.

The purpose of a back pay award is to make the discrimination victim whole, to erase the effects of illegal discrimination. To accomplish that purpose, courts construct the hypothetical employment history of the discrimination victim to determine the appropriate back pay period. UTU, 532 F.2d at 341.

Frequently, the employment history of the applicant who was actually hired will provide the best guide to the hypothetical employment history of the discrimination victim. In fact, the district court in this case used the employment history of the men hired in 1971 to determine the back pay periods for Gaddis, Starr, and Smith. But the employment history of the employee is not controlling in and of

itself. Actual employment histories are used only when they are the best available guide to the hypothetical employment history of the discrimination victim. The focus is on the probable job career of the victim, who is to be made whole, not on the career of the actual employee, who is of course not a party to the Title VII case.

In this instance, the special master tracked Simpson's work history, but only to a point. Simpson's employment history was used as the best indicator of the probable work history of the female applicants until Doris Baumgardner was hired to fill his job. At that point, the special master found that Simpson's employment history was abnormal. The testimony of Ford's warehouse manager revealed, as the special master found, that normally employees are recalled even

after their recall rights had expired. In this case, Simpson was not recalled, and a woman was hired in his place. Ford's departure from its usual practice took place after EEOC filed this sex discrimination suit.

It was apparent, then, that Ford's decision not to recall Simpson was out of the ordinary, a product of unusual circumstances. As a result, Simpson's work history failed as an indicator of the probable work history that one of the seven women would have had. Since laid-off employees were usually recalled, the special master made the only reasonable decision when he abandoned Simpson's actual work history and concluded that one of the seven women would have probably been recalled if she had been hired. If the special master had instead followed Simpson's work history, the special master

would have based the back pay period not on the hypothetical work history of the discrimination victim, but on the peculiarities of Simpson's situation. That approach would have been contrary to UTU and to the "make whole" doctrine of Albemarle Paper Co.

The special master adhered to the dictates of UTU and Albemarle Paper Co., by constructing the hypothetical work histories of the women. In our view, the special master reasonably decided that if one of the women had been hired in 1973 she would have been recalled in 1975 even though Simpson was not.

III.

In its complaint, EEOC asked the district court to "make whole those persons adversely affected by [sex discrimination], by providing appropriate back pay, with interest, ... and other affirmative relief

necessary to eradicate the effects of unlawful employment practices." As described above, the district court meticulously formulated a back pay award to correct the effects of sex discrimination against the women applicants.

But the district court offered the women no further remedies. Under Title VII, district courts have discretion in the formulation of remedial orders. E. g., Franks v. Bowman Transportation Co. At the same time, district courts have a duty to grant the "fullest relief possible to the victims of discrimination," to insure that the effects of discrimination are totally removed from the lives of discrimination victims. Albemarle Paper Co., 422 U.S. at 418, 95 S.Ct. at 2372, see also UTU, 532 F.2d at 341.

In this case, the district court did not discuss possible remedies other than

back pay. In its findings of fact and conclusions of law, in its referral order to the special master, and in its order adopting the special master's report, the district court did not address other remedial steps. Under Albemarle Paper Co., then, the district court was obliged to consider other remedies and if it rejected them to articulate its reasons.

The district court may not have discussed other possible remedies because it concluded that Ford had made diligent efforts since 1975 to hire women. Although Ford's affirmative action program might justify the district court's decision not to order general affirmative relief against sex discrimination, Ford's anti-discrimination efforts do not alter the district court's responsibility to redress the discrimination suffered by these individual women. Ford's good faith since 1975 does not

remove the burden placed upon the ten women by discrimination practices in 1971 and 1973. See UTU, 532 F.2d at 340.

In fact, these women are not aided in any fashion by Ford's program. They still do not possess the seniority they would have accumulated had they been hired in earlier years, and they do not yet have the jobs they might well have had if Ford had not discriminated against them. Ford's affirmative action program, then, does not excuse the district court's failure to consider additional relief for the individual women.

One seemingly desirable remedy in this instance would be to grant the women hiring preferences at the parts warehouse, with retroactive seniority. See 42 U.S.C. § 2000e-5(g); Teamsters v. United States, 431 U.S. 324, 325, 97 S.Ct. 1843, 1849, 52 L.Ed.2d 396 (1977); Franks v. Bowman

Transportation Co.; Cathey v. Johnson Motor Lines, Inc., 398 F.Supp. 1107, 1122 (W.D.N.C.1974).

This remedy may be particularly appropriate for the three women who were not hired in 1971. Gaddis and Starr have had difficulty finding jobs since 1971. After their final layoffs from General Motors, they were forced to enter a CETA training program, apparently unable to find work in the auto parts field. If Ford had not discriminated against them in 1971, they might well have avoided this checkered employment career. Smith had been employed during much of the time since 1971, but at relatively low wages. She also might be entitled to a hiring preference with retroactive seniority.

The seven women who were not hired in 1973 present a more difficult case. Ford filled only one opening in 1973, and thus

all seven cannot reasonably claim that they would have been employed by Ford since 1973 if Ford had not discriminated against them. However, the district court may be able to fashion a remedy, such as hiring preferences without seniority, which would grant them more complete relief than a back pay award.

If the district court decides to order Ford to hire any or all of these discrimination victims as positions come open, it should also consider whether the women should receive an additional monetary award to compensate them for the estimated earnings lost between the date of the district court's decision and the date of employment at the warehouse. See White v. Carolina Paperboard Corp., 564 F.2d 1073, 1091 (4 Cir. 1977). Such an award, along with back pay, preferential hiring,

and retroactive seniority, would constitute the "fullest relief possible."

We emphasize that the terms and conditions of relief for discrimination victims is determined by district courts, not by this court. We only instruct the district court to consider these possible remedies; not necessarily to provide them. On remand, the district court should articulate its reasons for rejecting or accepting the additional relief proposed by EEOC.

IV.

We affirm the district court's decision as a proper exercise of discretion founded on not clearly erroneous factual determinations. We remand for consideration of further remedies, so that the district court can fully exercise its discretion to formulate the most complete relief possible for these discrimination victims.

AFFIRMED AND REMANDED.

WALTER E. HOFFMAN, Senior District Judge, dissenting in part:

The District Court found that appellant, Ford Motor Company [Ford], had discriminated against ten women by failing to hire them by reason of sex, in violation of Title VII of the Civil Rights Act of 1964, and ordered back pay for each from the date of the discriminatory refusal of initial employment to the date of the filing of certain findings of fact and conclusions of law on December 30, 1977, together with compounded interest. Three of the women, Gaddis, Starr, and Smith, were determined to have been refused employment in 1971 when Ford hired three men; the remaining seven were not considered by Ford to fill an opening when,

in 1973, a man was hired. The seven women were permitted to share one award.[1]

I agree with the District Court and the majority that the evidence supported a finding that Ford was guilty of discrimination for certain periods of time. My disagreement lies in the remedy fashioned by the District Court, as expanded by the majority. I shall deal with Gaddis and Starr collectively; individually with Zettie Smith; and collectively with the remaining seven women. As noted in footnote (1), if I am correct with respect to Smith, she would automatically be added to the group of seven women.

1. Throughout this dissent, the woman known as Zettie Smith is treated as having been discriminated against in 1971, as the District Court found with the majority concurring. It is my view that Smith was not the subject of discrimination until 1973 and, if correct, Smith should be added to the other seven women and allowed a one-eighth interest in the combined award made for the benefit of the seven women.

Gaddis and Starr

Gaddis and Starr made written application for employment with Ford on July 21, 1971, after they had been laid off by General Motors [GM].[2] Three men commenced their employment with Ford in early or mid-August, 1971. At the time Ford hired the men—Blanchard, Coe, and Rogers—no consideration was given to the applications by Gaddis and Starr. Ford contends that its decision to hire the men was made prior to receipt of the applications from Gaddis and Starr, but at least two

2. It was generally conceded by all that the applications of Gaddis and Starr, received on July 21, 1971, were the first female applications received by Ford for employment in the warehouse. Their appliations were readily discovered by the EEOC during its investigation, but the alleged 1971 written applications of Zettie Smith, supposed to be prior to the Gaddis and Starr applications, were never located.

of three men were probably hired after July 21.[3] The men were interviewed for the jobs, whereas the warehouse manager only agreed to talk to the two women following their repeated requests for an interview and not until after the three openings had already been filled. While I agree that there was sufficient evidence of discriminatory practice not to hire women in a warehouse position in 1971, I

3. Coe did not begin work until on or after August 2. Blanchard, who began on August 5, was asked how long after he filed his application he was called to work and answered a week or two. Since he applied on May 18, the district judge apparently believed Blanchard understood the question to be how long before he began work on August 5 was he notified to report to work. Blanchard answered: " I don't remember as far as how long before, you know, a week or two weeks." (Emphasis supplied). The receptionist testified that the third man hired, Rogers, applied "pretty close to the same date that the girls [Gaddis and Starr] came in." Even if we were to assume the correctness of Ford's contention, the record adequately demonstrates that Ford did not believe that women should work in the warehouse.

do not suggest that an employer is required to update all applications for employment to the very moment of hiring in order to fill a position without discrimination. In November, 1972, Gaddis and Starr were given admittedly temporary employment by Ford for a period of approximately six weeks. Thereafter, they again went to work for GM on January 4, 1973, and, while employed by the latter, were given unconditional offers of employment by Ford in July, 1973, which both rejected.

Back Pay: Employment Elsewhere

I believe that the District Court extended Gaddis's and Starr's back pay well beyond the time it should have done so as a matter of law. The employment both women obtained at GM in January, 1973, was substantially equivalent to that denied them by Ford—approximately the same type of work, pay and conditions—and lasted over

a year. The period for back pay under Title VII and its model, the National Labor Relations Act [NLRA], does not end with any temporary or lesser employment that the rejected applicant or discharged employee may accept to mitigate damages, although such pay is subtracted from his total award. But once he obtains permanent, substantially equivalent employment, all back pay terminates.

The two courts, cited for the proposition that the womens' back pay should not stop with their employment by GM, did end each employer's liability when the employee obtained a permanent job at pay equal to that of the job illegally denied him or her. Butta v. Anne Arundel County, 473 F.Supp. 83, 89 (D.Md. 1979) (Back pay stopped when rejected applicant had net full-time earnings equal to those of the position he was denied and in a job comparable to that

withheld; once he was in that position, back pay did not resume again even when he voluntarily left for a lower-paying job); Weiner v. County of Oakland, 14 F.E.P. Cases 380 (E.D.Mich. 1976) (Back pay ceased when applicant was promoted by the employer who hired her after defendant's illegal denial of employment to a position comparable to the one she was denied).

Although at the time of judgment the rejected applicant in Weiner was still in the comparable job, and in Butta, had left his comparable job voluntarily, whereas Gaddis's and Starr's jobs in Charlotte with GM no longer existed, neither case holds that a job must last until judgment in order for back pay to be cut off all together. Some courts have gone beyond these two cases in their pronouncements, stating broadly that Title VII damages end with "employment" or "a job", but those words have been in

dicta. E. g., Taylor v. Safeway Stores, Inc., 524 F.2d 263, 267-68 (10th Cir. 1975) (Plaintiff entered school and court analogized to the rule: "If a discharged employee accepted employment elsewhere, there is little doubt that this would cut off any back pay award."); Milton v. Bell Laboratories, Inc., 428 F.Supp. 502, 515 (D.N.J. 1977) (Although court found no discrimination, it set damages to run "until [plaintiff] took a job" in case its decision was reversed on appeal; the job he had taken was comparable in pay, however.). The view of courts deciding NLRA cases, although unstated, seems to be that employment elsewhere only cuts off back pay if it is substantially equivalent and permanent. Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271 (1941); see also N.L.R.B. v. Mastro Plastics Corp., 354 F.2d 170, 179 (2d Cir. 1965),

cert. denied, 384 U.S. 972, 86 S.Ct. 1862, 16 L.Ed.2d 682 (1966) ("It would be unjust to require him to mitigate his damages to the greatest extent possible but then to penalize him for substantial but short-lived success."). The Board itself, however, has cut off back pay with a new job without stating any requirement that the job be permanent. E. g., Circle Bindery, 232 N.L.R.B. 1185, 1187-88 (1977); Star Baby, 140 N.L.R.B. 678, 683 (1963).

In my opinion, Gaddis's and Starr's employment with GM, because it was intended to be permanent and, in fact, lasted over a year, cut off Ford's back pay liability to them.

Throughout the majority opinion reference is made to the Gaddis and Starr employment by GM in January, 1973, as being "temporary". The record makes no reference to "temporary" employments, and

there is no evidence from either Gaddis, Starr, or GM, that the employment in 1973 was not intended to be permanent. Indeed, the fact that Gaddis and Starr were offered a job with GM in Atlanta, following the closure of the Charlotte plant, is a rather clear indication that the positions were permanent. True, when GM left the Charlotte area in 1974, it can be argued that the result was a "temporary" job, but is this the test which courts should employ in determining whether employment is "temporary"? Even the majority agrees that if the January, 1973, employment by GM was permanent, this served as a cutoff for any back pay award.

Back Pay: Refusal of Job Offer

Ford's offers of employment to Gaddis and Starr in July, 1973, were not contemporaneous. Gaddis, who had a reasonably satisfactory working record while engaged in

her temporary employment by Ford, was given the first offer. After Gaddis rejected the offer, Ford contacted Starr with a similar offer, which Starr likewise rejected. The discussions between Ford and the two women at the time the offers were made involved no consideration of back pay or seniority rights. At trial, Gaddis and Starr indicated that they refused Ford's offers because neither wanted to be the only woman working in the warehouse, which was the primary reason they gave Ford at the time for declining the jobs, and because they did not want to lose their seniority rights at GM, where they were then employed and remained employed until January 25, 1974.[4] The latter reason was not

4. The date of Starr's termination of employment by General Motors is uncertain. The Special Master reported that it was "sometime in 1974." However, Gaddis testified that she and Starr had exactly the same periods of employment by GM (App. 587). When GM closed its Charlotte Plant in 1974 and moved to Atlan-

conveyed to Ford at the time they rejected the offers. [5]

For the reasons stated, infra. I am of the opinion that, if the right to back pay for Gaddis and Starr did not terminate with their reemployment at GM on January 4, 1973, it certainly ended when they were

ta, both Gaddis and Starr rejected GM's offers of employment in Atlanta. I do not contend, however, that their refusal to accept employment in Atlanta terminated their right to back pay unless it had been previously terminated for other reasons.

5. Gaddis testified at trial that she refused the offer because she was reluctant to leave her "good seniority with General Motors and I had a secure job." Both testified they were concerned because they did not know exactly what job they would perform in the warehouse. Gaddis said she preferred working under less stress and pressure at GM, and both said they did not wish to be the only woman working in the Ford warehouse. Massey, who made the offer for Ford, testified that Gaddis expressed concern when the offer was made as to the lack of regular hours, Ford's motive in making her the offer when she had an EEOC claim pending against them, and whether Starr would also be hired so that she would not have to be the only woman in the warehouse. The latter reason

given unconditional offers of permanent employment in the warehouse at Ford's plant in Charlotte in July, 1973. In its findings and conclusions the district court, citing one of its own decisions, Brown v. Colman-Cocker Co., 10 C.C.H, E.P.D. ¶10,-492(W.D.N.C.1975), as precedent said:

> Back pay due to Gaddis and Starr shall not be affected by their refusal to accept the single position offered to them in July, 1973, inasmuch as neither would have been confronted by that decision and its implications had both been hired in August, 1971.

The earlier opinion by Judge McMillan, however, dealt with a situation very different from that here involved, and its holding was quite distinct: An offer of reinstatement, not initial employment, was invalid

> was her primary concern at the time she refused Ford. According to Massey, Starr was being offered the job after Gaddis turned it down, and expressed the same concern to him about being the only woman in the warehouse.

because it offered only a lower-paying job instead of the same employment from which the plaintiff had been fired illegally. The case said nothing about including back pay or seniority in an offer.

The majority agreed with the District Court that Ford's offers to Gaddis and Starr were insufficient to stop back pay liability because, at the time of the offers of initial employment, Gaddis and Starr were employed by GM and had acquired at least minimal seniority rights. Ford's unconditional offer of initial employment did not include any retroactive seniority rights and as the majority states (footnote 9, p. 193):

> This failure of Ford to offer retroactive seniority prevents Ford from relying on its offers to Gaddis and Starr.

Nothing is said by the District Court or the majority as to how Ford could have made

an offer of retroactive seniority rights to a new employee under Ford's collective bargaining agreement. Indeed, I hazard the assumption that an offer of retroactive seniority rights to a new employee would have been in direct violation of such an agreement, as contrasted with an offer to reinstate an employee who had been previously permanently employed by Ford and wrongfully discriminated against by a discharge.

Both Title VII and NLRA cases make clear that an employer is under no obligation to include such things as back pay and retroactive seniority in an offer of initial employment for the offer to be valid, as opposed to an offer of reinstatement to an illegally fired employee. NLRA cases give direct guidance in this area because Title VII "was expressly modeled on the back pay provisions of the National Labor Rela-

tions Act." Albermarle Paper Co. v. Moody, 422 U.S. 405, 419, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975). NLRA cases hold that an offer must be unconditional—that is, the employer cannot condition the offer on the employee's agreement to abandon his rights to pursue claims to back pay and other rights. See, e. g., Elling Halvorson, Inc., 222 N.L.R.B. 534 (1976). ("The duty to reinstate is not fulfilled by a conditional offer of reinstatement."); N.L.R.B. v. St. Mary's Sewer Pipe Co., 146 F.2d 995, 996 (3rd Cir. 1945) (Offer to reinstate striking employees if they withdrew their unfair labor practice charges against the company was invalid.) Similarly, under Title VII, the employer cannot ask the employee to give up back pay or other rights as a condition to his offer of reinstatement or the offer will be invalid. In addition, under both Acts, the employer must offer the

same job. A. W. Behney Construction Co., 224 N.L.R.B. 1083, 1087 (1976) ("An offer to reinstate an illegally discharged employee should be on the same terms that applied when the employee was fired."). The employer cannot cut off his back pay liability with the offer of a dangerous alternative to the job from which the discriminatee was illegally fired or one so "inferior" as to constitute a "demotion," Williams v. Albemarle City Board of Education, 508 F.2d 1242, 1244 (4th Cir. 1974) (en banc), or a lower-paying job, Colman-Cocker Co., supra; but see Knickerbocker Plastic Co., 132 N.L.R.B. 1209, 1218 (1961) (Offer of lower-paying jobs was valid to cut off back pay liability under NRLA for all but difference in salary between jobs fired from and one offered).

An unconditional offer of reinstatement that does not demand that the employee

surrender his back pay or other claims is enough: the employer need not volunteer back pay or give up his rights to defend against those claims. For example, the Eighth Circuit, in finding an offer to be invalidly conditioned on an employee's dropping his unfiar labor practice charges, said in dicta, "It is clear that had the Company's offer of reinstatement been conditioned solely on its refusal to give back pay, as the Company strenously argues, then the offer of reinstatement would not have been invalidated." N.L.R.B. v. Midwest Hanger Co., 550 F.2d 1101 (8th Cir.), cert. denied 434 U.S. 830, 98 S.Ct. 112; 54 L.Ed.2d 90 (1977). The Ninth Circuit cut off back pay when an employee rejected a reinstatement offer because it did not include back pay. N.L.R.B. v. Harrah's Club, 403 F.2d 865, 871 (9th Cir. 1968). The rationale is that, as long as the employer does not condition his

offer on the employee's giving up his back pay rights, the employer need not promise back pay because the employee can accept the offer while still retaining the right to pursue back pay and other claims through judicial or administrative channels. See, generally, D'Armigene, Inc., 148 N.L.R.B. 2 (1964), enforced as modified, N.L.R.B. v. D'Armigene, Inc., 353 F.2d 406 (2d Cir. 1965); Differential Steel Car Co., 75 N.L. R.B. 741, enforced, N.L.R.B. v. Differential Steel Car Co., 179 F.2d 241 (6th Cir. 1949). As stated in Reliance Clay Products, 105, N.L.R.B. 135, 137 (1953), "The Board has held that a discriminatorily discharged employee may not refuse an unconditioned offer of reinstatement even though unaccompanied by back pay: that such offer tolls the employer's liability for back pay ...." This circuit has agreed, stating that the employer "having once offered reinstate-

ment, is released from the back pay obligation from the date the offer was rejected." N.L.R.B. v. Huntington Hospital, Inc., 550 F.2d 921, 924 (4th Cir. 1977). The same is true of the employee's refusal of a valid job offer under Title VII: his back pay rights are cut off at that point. Cofield v. Goldman, Sachs & Co., 364 F.Supp. 1372, 1374 (S.D.N.Y.1973); Blakely v. Chrysler Corp., 407 F.Supp. 1227, 1230 (E.D.Mo.1975), rev'd on other grounds sub nom. Chrysler Corp. v. Mann, Trustee, 561 F.2d 1282 (8th Cir. 1977). The one Title VII case that has held otherwise, Comacho v. Colorado Electronic Technical College, Inc., 590 F.2d 887 (10th Cir. 1979), relied upon by the majority, involved an illegally fired employee, not as here applicants being illegally denied initial employment, and thus, its holding only dealt with offers of reinstatement: "Thus we must hold that a reinstatement offer

without back pay does not relieve a guilty employer from further liability," Id. at 889.

Just as the above cases do not demand that an employer include back pay in his offer, so no NLRA or Title VII cases require that an offer of initial employment, to be valid to cut off back pay, include retroactive seniority to the date of the initial refusal to hire, as is held here by the majority.[6] All the cases cited by the majority

6. The Third Circuit's holding in Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (1973), which was relied upon by the majority, was vacated and remanded by the Supreme Court, and this is not reliable precedent. That circuit had held that an offer of employment to an applicant illegally refused a job was invalid if it failed to include back pay or seniority rights. Id. at 1047. That entire decision was vacated and remanded by the Supreme Court, 414 U.S. 970, 94 S.Ct. 293, 38 L.Ed.2d 214 (1974), to be reconsidered in light of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). McDonnell Douglas sheds no light on the issue, as it does not deal with back pay or seniority rights. The Third Circuit later remanded the case for a second time, saying "It is true that when this case was first here we held that the plaintiffs should also recover for loss of earnings after they rejected that [offer without seniority or back pay] and until Weigand should reemploy them with se-

deal with the need for an employer who has illegally fired one of his employees or denied that person promotion to include retroactive seniority in his reinstatement or promotion offer. The reasons cited as calling for an employer to make a discharged employee whole in a reinstatement offer do not apply to a new employee. The Fifth Circuit in Claiborne v. Illinois Central R.R., 583 F.2d 143 (5th Cir. 1978), cert. denied, 442 U.S. 934, 99 S.Ct. 2869, 61 L.Ed.2d 303

niority and back pay. But when the Supreme Court reviewed our decision and remanded the case to us, it expressly vacated our ruling on damages." 528 F.2d 1214, 1216 (3d Cir. 1975). The District Court was then told to reconsider the damages issue in light of McDonnell Douglas and Albemarle, supra. As no further proceedings are reported, the case has no precedential value as to the need to offer seniority rights to its new employees. Moreover, Jurinko dealt with former discharged employees, as did Sprogis v. United Air Lines, 444 F.2d 1194, (7th Cir.), cert. denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971), the only authority relied upon by Jurinko. Indeed, the majority opinion here in footnote 9, p. 193, specifically states that "An offer of reinstatement carries with it seniority rights, whereas an offer of beginning employment includes no seniority rights."

(1979), in remanding for the lower court to determine whether refusals by discharged employees of offers of reinstatement without retroactive seniority or back pay cut off their back pay rights, believed that each employee's refusal had to be looked at separately. "[T]he disadvantages to them of returning to the railroad without retroactive seniority, would more than justify a particular employee in refusing an offer of reinstatement." Id. at 153. Similarly, in United Transportation Union v. Norfolk & Western Railway Co., 532 F.2d 336 (4th Cir. 1975), cert. denied, 425 U.S. 934, 96 S.Ct. 1664, 48 L.Ed.2d 175 (1976), Judge Winter wrote for this circuit that refusals by blacks to accept promotions from predominantly black jobs to white jobs, with a concomitant loss of seniority, did not cut off their back pay rights because "[a] refusal to commit seniority suicide is not an acceptable

reason to deny back pay. Victims of discrimination should not be required to forfeit wage and seniority benefits accruing because of their seniority in order to remain eligible for purely speculative back pay relief." Id. at 340 (emphasis supplied). Back pay is to be cut off, Judge Winter again wrote for this court in Hairston v. McLean Trucking Co., 520 F.2d 226, 232 (4th Cir. 1975), "[O]nly if the refusal [of an offer of transfer] was a free and voluntary act on the part of the employee, not constrained by any discriminatory employer practice or policy, ..." A refusal is not free and does not cutoff back pay if "motivated by reasonable reluctance to expose himself to another aspect of an employer's discriminatory employment policy, as for example, a discriminatory loss of seniority...." Id. (emphasis supplied).

It is clear that what this court has de-

manded is protection in a reinstatement or promotion offer for seniority already earned by employees of a defendant company. The distinction between those cases and the one at hand is clear: here the applicants were denied initial employment, had never worked for Ford before except on a temporary basis, and thus had no seniority rights "accrued" that they were being asked to "forfeit." The reasons why courts have not made the same demand of employers offering an initial job to an applicant illegally denied employment should be obvious: it would be unfair to present employees with accrued seniority; probably would create havoc in employer/employee relations, especially if the Company is unionized; and might be in clear violation of the employer-employee contract. See Meadows v. Ford Motor Co., 510 F.2d 939, 949 (6th Cir. 1975), cert. denied, 425 U.S.

998, 96 S.Ct. 2215, 48 L.Ed.2d 823 (1976), ("... where the burden of retroactive pay falls upon the party which violated the law, the burden of retroactive seniority for the determination of layoff would fall directly upon other workers who themselves had no hand in the wrongdoing found by the District Court."); Local 189 United Papermakers & Paperworkers v. United States, 416 F.2d 980, 985 (5th Cir. 1969), cert. denied, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970).

The Supreme Court has held that § 703(h), which protects a bona fide seniority system from Title VII's strictures even if it tends to perpetuate pre-Act discrimination, does not prevent courts from ordering defendants to grant retroactive seniority to applicants illegally refused initial employment. Franks v. Bowman Transportation Co., 424 U.S. 747, 762, 96 S.Ct. 1251, 1263, 47

L.Ed.2d 444 (1976). That holding, however, merely gives a court power to so order but does not obligate an employer to include such seniority voluntarily in an offer of employment. By analogy, courts also have the power to award back pay in judgments against companies determined to have violated Title VII, but the rule remains that an employer need not voluntarily include back pay in an offer of employment for such offer to be valid. The reasoning is the same here: Even though courts have the authority to order retroactive seniority in their decrees, employers need not grant that seniority in an offer of initial employment to a discriminatee for that offer to be valid. The theory behind an offer of employment, whether under NLRA, or Title VII, is the same: a job comparable to the one denied the applicant—or from which the employee was fired or to which he was

refused promotion—must be offered to him, without any encumbering conditions that would force him to give up certain rights. The employee can then accept if he wishes and pursue back pay, seniority, or other rights he believes he was denied, through the courts or administrative agencies. Conversely, that offer does not need to include a surrender by the employer of his right to defend against such claims. If the employee rejects that unconditional offer, his right to back pay is cut off. Here, Gaddis and Starr rejected unconditional offers of the same jobs for which they had applied. Those offers did not need to—and did not—include a grant of back pay or retroactive seniority, but, on the other hand, were not conditioned on the surrender by Gaddis or Starr of their rights to pursue those claims. Indeed, the majority refers to Ford's "unconditional" offer, although it qualifies that

by stating that an offer of seniority was a prerequisite. Therefore, the offers were valid and their rejection by Gaddis and Starr cut off back pay and reinstatement rights.

Even were the court to hold otherwise—that Ford's offer should have included seniority and back pay—the failure of Gaddis and Starr to protest that lack of seniority and their clear indications that they rejected the offers primarily for other reasons estop them from relying on those excuses now. Neither told Ford at the time of the offers that they wanted retroactive seniority back to the date of Ford's first refusal to hire them; neither insisted on or even suggested they be given retroactive seniority as a condition to accepting the offer. The majority's view was that the women had a right to refuse the offers as invalid for lack of seniority, but, in my opinion, that expla-

nation for their refusal should not be available to the women post hoc facto as an excuse for invalidating Ford's unconditional offers. In an analogous case, the Tenth Circuit overturned an award of back pay that the Board had continued past the employee's refusal of an offer because the Board found it was invalid due to too short a time for acceptance. In N.L.R.B. v. Betts Baking Co., 428 F.2d 156, 159 (10th Cir. 1970), the court wrote that the offer was valid despite the time restriction because "[w]e think that [the employee's] failure to complain of the time limitation precludes him from complaining of the reasonableness of the reporting time." In my opinion, Gaddis and Starr, by not complaining to Ford at the time of the offers about its failure to grant retroactive seniority, or back pay, are precluded from complaining later that Ford's offer to them was not

valid for that lack.

Back Pay: Full-Time Schooling

In September, 1975, as noted by the majority, Gaddis and Starr entered a CETA program for the unemployed and commenced a nurses training program. The same month Ford hired its first woman, Doris Baumgardner, as a permanent employee in the Ford warehouse. As reported by the Special Master, the CETA program required full-time participation. Gaddis completed her training course in September, 1976, and accepted employment as a licensed practical nurse at the Gaston Memorial Hospital. Starr, obviously not with the ability of Gaddis, graduated in 1977 and since November 4, 1975 has been a missionary, along with her husband, affiliated with the Maranatha Baptist Mission, Inc. Both Gaddis and Starr received the minimum-wage rate while undergoing training under

the CETA program.

The Special Master, the District Court, and the majority held that Gaddis and Starr did not remove themselves from the labor market when they entered the CETA program. While I contend that their right to back pay should have been terminated either when they accepted permanent employment with GM or were afforded unconditional offers of permanent employment, I also disagree as to the effect of their entry into the CETA program.[7]

7. Gaddis testified (app. 579) before the court:

"Q. Has there been any time when you have stopped seeking employment?
"A. Yes, sir, when I started to school on a full-time basis in 1975."

Before the Special Master, Gaddis was asked (App. 1114):

"Q. Ms. Gaddis, during the period September, 1975, while you were in the SETA (sic) training program, were you still available for work?
"A. Yes, sir, I suppose you could say I was."

And later (App. 1119):

"Q. If you had been offered a job during that period by Ford Motor Company, would

The issue for the court should be whether the women continued to seek employment after they began the program or, by entering the nurses training program, removed themselves from the job market. "[I]n order to establish eligibility for any award of back pay, a claimant must prove as a first step a sufficient investment of time and effort to show that he was ready, willing and available to take work. ..." United States v. Wood, Wire & Metal Lathers, 328 F.Supp. 429, 443 (S.D.N.Y. 1971), aff'd, 471 F.2d 408 (2nd Cir. 1973). "[A] claimant who ... chose not to work at all (e.g., upon

you have taken the job?
"A. Well, since I wasn't offered, it's hard to say. I certainly would have given it great consideration."
As to Starr, the only testimony on the subject was before the Special Master (App. 1159):
"Q. While you were in that SETA (sic) training program, Ms. Star (sic), were you still available for work?
"A. Yes, sir."
"Q. If you had been offered a job at the Ford Motor Company in 1975 would you have considered that offer?
"A. I would have considered it."

returning to school) may not be deemed to have been 'ready, willing and available, and thus eligible for compensatory [back] pay, ..." Id. at 444. The Tenth Circuit has said that "when an employee opts to attend school, curtailing present earning capacity in order to reap greater future earnings, a [Title VII] back pay award for the period while attending school also would be like receiving a double benefit." Taylor, supra, at 267-68.

That circuit upheld a cutoff of the employee's back pay rights despite the fact that, in contrast to Gaddis and Starr, "Taylor testified while attending school, he continued to look for employment" and, "had he found full-time work anytime prior to receiving his bachelor's degree in December 1971, Taylor asserts he would have accepted it." Id. at 267.

Under the NLRA, receipt of pay and

travel expenses by an illegally fired employee while in a Manpower Training Program analogous to the pay received by the two women in the CETA program, was held to be "tantamount to having accepted a permanent job," and therefore to end the employer's back pay obligation. N.L.R.B., v. Ohio Hoist Manufacturing Co., 496 F.2d 14, 15 (6th Cir. 1974). The Seventh Circuit held that, under the Vietnam Veterans' Readjustment Act, a veteran's rights to lost wages from the former employer who refused to rehire him would continue during his schooling "unless on remand defendant [employer] can show that plaintiff abandoned his willingness to continue in its employ under the conditions mandated by the Act when he enrolled in the University ... as a student seeking a degree." Hanna v. American Motors Corp., 557 F.2d 118, 122 n.2 (7th Cir. 1977). That case dealt with an

Act that, unlike the NLRA, was not a model for Title VII back pay and created very different conditions for an employee seeking to maintain his right to back pay. Gaddis and Starr claimed they felt under some pressure from the State of North Carolina to enter the program so as not to lose their rights to unemployment compensation, but they were not required by Title VII itself to enter school.

On the contrary, Title VII and NLRA cases make clear that the criteria should be the claimants' efforts to seek work and their availability to take jobs during the time they were in school. Although Gaddis "suppose[d]" she was still available for work, she admitted she made no effort to seek work after she became a full-time student because "I was considered having a job by working under the Man Power Program [CETA]." Even had Ford sought them out

to make second offers after they entered CETA, by their own testimony, they were not at all sure they would have accepted. The evidence completely fails to support the district judge's necessarily implicit conclusion that they were seeking work, were available for same while in school, and would have accepted offers from Ford if made. It is my opinion that back pay, if not ended sooner, certainly should be terminated at this juncture. The Tenth Circuit's holding that back pay ends with full-time school analogizes a commitment to schooling to a decision to accept a permanent job. Taylor, supra, at 267-68. Under the majority's reasoning here that the womens' jobs at GM did not cutoff their back pay because they did not last until trial, the fact that Gaddis and Starr finished a nurses training program and that Gaddis is still employed as a nurse, Starr having left that profession

voluntarily to become a missionary, should mean that the beginning of CETA training marked the end of back pay for the two because that schooling led to a permanent new profession; at that point, the rationale for back pay of compensation for losses no longer applied.

Back Pay: Unemployment Compensation

I agree with the majority in upoholding the District Court's decision not to deduct unemployment compensation payments received by Gaddis and Starr—or any of the victims—from their back pay awards. The Supreme Court's reasoning in N.L.R.B. v. Gullett Gin Co., 340 U.S. 361, 364, 71 S.Ct. 337, 339, 95 L.Ed. 337 (1951), as to NLRA awards is directly applicable here, Title VII awards being expressly modeled on NLRA back pay grants, Albemarle, supra, 422 U.S. at 419, 95 S.Ct. at 2372. I would not hold, however, as the majority seems to here,

that unemployment payments must not be subtracted from Title VII awards. Majority Opinion at 196. Rather I would follow exactly the holding in Gullett Gin Co.: "... we hold that the Board had the power to enter the order in this case refusing to deduct the unemployment compensation payments from back pay, and that in doing so the Board did not abuse its discretion." Id. at 364, 71 S.Ct. at 339. Other circuits, relying on Gullett Gin Co., have understood this to be its holding and therefore upheld awards both deducting and refusing to deduct unemployment compensation as long as each decision is not an abuse of the lower court's discretion. E.g., Satty v. Nashville Gas Co., 522 F.2d 850, 855 (6th Cir. 1975), vacated and remanded on other grounds, 434 U.S. 136, 98 S.Ct. 347, 54 L.Ed.2d 356 (1977), on remand, 18 F.E.P. Cases 394, 401 (M.D. Tenn. 1978); Ostapowicz v. Johnson

Bronze Co., 541 F.2d 394, 401 (3d Cir. 1976), cert. denied, 429 U.S. 1041, 97 S.Ct. 741, 50 L.Ed.2d 753 (1977); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 721 (7th Cir. 1969).[8] Similarly, courts in the Fourth Circuit should be free to exercise their discretion in making a determination on this issue, whereas the majority would seem to set it as the rule in this circuit that such payments should not be deducted.

The end result of the lower court's refusal to cut off back pay for Gaddis and Starr at any point—either when they obtained almost identical employment for over a year, refused valid unconditional offers

8. Excellent discussion of the various decisions and the reasons pro and con are contained in E.E.O.C. v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980) (upholding decision not to deduct unemployment payments from age-discrimination back pay awards under another Act) and E.E.O.C. v. Enterprise Association Steamfitters, Local 638, 542 F.2d 579, 591-92 (2d Cir. 1967), cert. denied, 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed.2d 588 (1977) (not an abuse of discretion for lower court to deduct public assistance payments from Title VII).

from Ford, or removed themselves from the job market to enter a full-time nurses training program to learn a new profession that one woman still practices today—is that Ford must reimburse the two women the aggregate sum of $88,843.50. That total could go beyond $100,000 under the majority's decision to keep the clock running for perhaps another three years until both are given a second chance to refuse job offers in Ford's warehouse.

Zettie Ann Smith

Liability

In footnote 4, p. 188, the majority states that "Smith's testimony is not a model of clarity." In light of the record, this is a mild expression.

The name of this witness was not included by the EEOC in the pretrial order. Ford's counsel objected (App. 677) when she was first called by plaintiff. Admittedly,

Smith filed an application for employment on March 5, 1973. However, before the district judge she was asked about applications with Ford, and she replied (App. 683):

"A. In 1971, I was out in April and filed an application, and in 1971, in June, I was out and filled out an application, I believe.

"Q. Do you remember what happened?

"A. In 1972, I was out one time and filled out an application and this, I believe was my last application out there.

"Q. So, was that four applications in all that you have given?

"A. I think so.

"Q. 1971.

"A. And 1972 and 1973.

"Q. That's three applications.

"A. That is three applications and I believe I was out in 1974 and filled out an application, because this was just right after I had gone to Terrell Machine, and I thought that I would not be satisfied with the job there." (App. 684).

Based solely upon this testimony the Dis-

trict Court found (App. 60) that Smith applied in June, 1971, for a warehouse job. The reason the District Court accepted the June, 1971 date in preference to April, 1971, is not explained by the record.

Immediately after Judge McMillan filed his findings and conclusions as to the right of Zettie Smith to receive back pay based on a June, 1971 application, Ford moved to amend the findings as to Smith (App. 73-76), with particular reference to when she first applied for employment, asserting the following:

1. No knowledge during the E.E.O.C. investigation, discovery, settlement negotiations, or at any time prior to trial, that anyone other than Gaddis and Starr would be entitled to back pay for individual discrimination.
2. Ford's inability to prepare its defense to any claims that Smith filed an

application in 1971, and the fact that E.E.O.C. had examined Ford's files and in 1973 when applications of Gaddis, Starr and other women applying in November, 1972, and thereafter, were located.

3. E.E.O.C. made no attempt to conciliate as to any claim by Smith.
4. The finding by the district court makes Smith the first woman to apply for a warehouse position at Ford, despite all testimony (except Smith's) that Gaddis and Starr were the first female applicants.

Three days later the District Court denied Ford's motion (which included a request to present further evidence after an opportunity to prepare) and directed that the finding should stand. Thus, when the matter went before the Special Master, Ford could not present evidence contradicting the find-

ing by the District Court. The final result was that Smith was awarded $30,718.61 in back pay whereas, if her application was in fact filed in March, 1973 (which is admitted), Smith would then only participate in one-eighth of the back pay loss for one position—an amount at most in the neighborhood of $3,000.00, assuming the majority is correct as to its discussion with respect to seven women, and, in my view, far less than $3,000.00

Ford's policy was undeniably to require written applications. The District Court has found that a written application was filed by Smith in June, 1971. EEOC argued that the lack of a written application for Zettie Smith before 1973 was not relevant, because Ford threw away applications after six months, but the presence of the 1971 applications by Gaddis and Smith, and the 1973 applications by Smith and Simpson,

among others, contradict that contention. Ford's manager testified that Gaddis and Smith were the first women to apply for jobs in the warehouse. The Ford receptionist also testified that Gaddis and Starr were the first women who applied for such jobs in the warehouse in Charlotte, but, because she was only one of Ford's receptionists and at that time only relieving the regular receptionist at lunch and other breaks, her testimony was not persuasive. A further hearing would allow Ford to present, among other evidence, the testimony of all its regular receptionists for that period, so as to cover all those who could have possibly received an application from Zettie Smith in 1971.

Under McDonnell Douglas, supra, 411 U.S. at 802, 93 S.Ct. at 1824, EEOC had the burden of proving, among other elements, that Zettie Smith applied for the job and

was rejected. In my opinion, it did not carry that burden. If one accepts that EEOC even made out a prima facie case, Ford presented enough evidence "to articulate some legitimate non-discriminatory reason for the employee's rejection," id., to-wit, that it did not know she was applying for a job in the warehouse. Recent cases such as Furnco Construction Co. v. Waters, 438 U.S. 567, 98 S. Ct. 2943, 57 L.Ed.2d 957 (1978), and Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978), make clear that the burden on the employer of articulating such a reason is not very heavy. The ultimate burden of persuasion remains on the employee, and thus, the employer need only articulate such a reason, Furnco, supra, 438 U.S. at 576-78, 98 S.Ct. at 2949-50, that is, "'explains what he had done' or 'produce[s] evidence of legiti-

mate nondiscriminatory reasons,'" Sweeney, supra, 439 U.S. at 25,n.2, 99 S.Ct. at 297, n.2, which the Court has found to have a "significant distinction" from requiring the employer to prove the absence of a discriminatory motive, id., at 25, 99 S.Ct. at 297. See also Loeb v. Textron, Inc., 600 F.2d 1003, 1011-12 (1st Cir. 1979) (Sweeney makes clear that the burden on the employer is not to persuade but only to produce evidence of a legitimate reason, which then shifts the burden back onto the employee to show the reason is merely a pretext for discrimination); See also Wright v. National Archives & Records Service, 609 F.2d 702, 714 n.13 (4th Cir. 1979) (en banc).

Smith's own testimony lends support to that explanation of why she was not given a warehouse job in 1971—she did not make it at all clear to Ford that she was seeking a job in the warehouse. Smith testified be-

fore the district judge as follows (App. 689-90):

"Q. Did you indicate in, on each occasion that you were applying for work in the Ford warehouse or what did you tell them?

"A. I didn't indicate what job I applied for, I just, unless it was something in my line of work or whatever."

Her prior work was in filling orders in a stockroom; although similar to the picker-packer job she claims she was illegally denied, it is not the same job, and therefore, she did not unambiguously indicate what job she was seeking. In addition, it is not even clear from her testimony that she is certain she told Ford she wanted work similar to what she was then performing or, if she did, that she described her then job sufficiently for Ford to understand what employment she wanted. If she made out a

prima facie case—that she applied, was qualified, and yet was rejected—Ford has rebutted that by articulating a legitimate nondiscriminatory reason explaining why it did not hire her: It did not know she had applied for a warehouse job. Given the ambiguity of her own testimony, Ford's explanation is persuasive and carried its burden, admittedly a light one. Certainly, she failed completely to show that Ford's reason was a mere pretext for intentional discrimination, a charge she made no attempt to prove.

Because of Ford's surprise at Smith's testimony that she first applied for employment in 1971—and indeed to the surprise of EEOC—I would at least remand this phase of the case for a further hearing on that issue to allow Ford an opportunity to present further evidence for its position that she did not apply for a warehouse job

prior to March, 1973. In sum, the action of the District Court in denying Ford's motion to amend the findings by permitting additional evidence was reversible error.

Seven Women

Liability

I agree that the evidence warranted a finding that Ford discriminated against seven women—eight if Smith is added—when it hired Simpson in July, 1973. Under Ford's "buddy system," applications were considered current for only six months, a practice about which applicants were not told, and employees were allowed to update friends' applications as well as recommend them. Simpson testified he asked a friend numerous times to "bird-dog" his application, and the friend apparently updated it for him. The Special Master determined that Ford gave him the job at least in part to accommodate his friend. Such practices,

common at Ford, were its "standard operating procedure," Teamsters v. United States, 431 U.S. 324, 336, 97 S.Ct. 1843, 1855, 52 L.Ed.2d 396 (1977).

Practices similar to updating and bird-dogging applications have been condemned by this Court. "Word-of-mouth hiring, which the district court found to be [the employer's] primary method of recruiting new over-the-road drivers, is discriminatory because of its tendency to perpetuate the all-white composition of a work force." Barnett v. W. T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975). In addition, the use of subjective criteria, such as recommendations of employees, has been criticized: "Nonobjective hiring standards are always suspect because of their capacity for masking racial basis [sic]." Id. at 550. See also Weiner v. County, supra, at 382, ("The use of employee preferences in making hiring

decisions is questionable when all employees are male and there is no affirmative action program ...."). Here, as in W. T. Grant Co., the statistics alone, though persuasive, may not have been enough to make out a case of discrimination.[9] W. T. Grant Co., supra, at 549. The majority concedes that "E.E.O.C.'s case is less than totally convincing because Ford made only one contested employee decision between 1971 and 1973."[10]

9. "Statistics can in appropriate cases establish a prima facie case of discrimination, without the necessity of showing specific instances of overt discrimination." W. T. Grant Co., supra, at 549. However, those statistics must be large enough to stand alone. "Considerations such as small sample size may, of course, detract from the value of such evidence." Teamsters, supra, 431 U.S. at 340, n.20, 97 S.Ct. at 1856, n.20. An employer can defend against a case establishing a pattern or practice by showing "that during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination." Id. at 360, 97 S.Ct. at 1867.

10. Ford says it filled only three slots from 1972 to 1975 and one was offered to Gaddis and Starr, whereas EEOC sees Ford as having received applications from thirteen qualified

Nevertheless, the net result here is the same as in W. T. Grant Co.—no black supervisors or over-the-road drivers in W. T. Grant Co., and no women permanent employees in Ford's warehouse until 1975—and the similar discriminatory practices of word-of-mouth hiring and subjective criteria strengthen both statistical cases, as the majority correctly pointed out. This court has explained, "In addition to statistics, a court must also examine 'patterns, practices and general policies to ascertain whether racial discrimination exists'." W. T. Grant Co., supra, at 549. In my opinion, Ford's discriminatory practices and the total exclusion of women from the warehouse until 1975 made out a prima facie case of discrimination in hiring Simpson.

The court rejected Ford's rebuttal evi-

women, none of whom were interviewed when the males, who were interviewed, were hired to fill all the openings up until 1975.

dence that it had a legitimate, nondiscriminatory reason for hiring Simpson: Ford claimed he was more qualified than the women it did not consider. As discussed earlier in relation to the 1971 discrimination against Gaddis and Starr, recent Supreme Court cases have made it clear that this burden on the employer is light; he need only articulate such a reason or explain his reasons for not hiring the alleged victims of discrimination. Nevertheless, no matter how light the burden of showing a nondiscriminatory reason, the lower court's rejection of Ford's rebuttal argument that Simpson was more qualified was not clearly erroneous. The employment records of several of the women were almost identical to that of Simpson.

The Special Master found that Ford's action in hiring Simpson "was not motivated by an intent to discriminate." App. 236.

This finding would prevent the EEOC from arguing that the reason Ford gave for hiring Simpson was a mere pretext for discrimination.[11] In New York City Transit

11. The Special Master's finding that Ford did not intend to discriminate in my opinion would also prevent the EEOC from successfully proving discrimination in 1973 using a theory of disparate treatment under McDonnell Douglas, supra, 411 U.S. at 802, 93 S.Ct. at 1824. My greatest problem with finding discrimination by Ford in 1973 is an inability to determine which theory was used, disparate impact or disparate treatment. See Teamsters, supra, 431 U.S. at 335-36 n.15, 97 S.Ct. at 1854 n.15. See also Wright, supra, at 712-15. The Special Master interpreted the District Court's finding of discrimination in 1973 to be based at least in part on a pattern or practice of discrimination, App. 236, 285-86, but those words can be used to establish discrimination under either theory. Teamsters, supra, at 335-36 n.15, 97 S.Ct. at 1854 n.15. "Either theory may, of course, be applied to a particular set of facts," id. at 336 n.15 , 97 S.Ct. at 1854 n.15; both can be argued in the same suit, Furnco, supra, 438 U.S. at 582, 98 S.Ct. at 2952, and they can be pleaded as alternative theories of discrimination, Wright, supra, at 711.

The language used by the Special Master, District Court, and majority here all point to disparate treatment as the theory applied here. For example, the prima facie case the EEOC made out was clearly based on McDonnell Douglas, supra, 411 U.S. at 802, 93 S.Ct. at 1824: the women were shown to have applied, been qual-

Authority v. Beazer, 440 U.S. 568, 587, 99 S.Ct. 1355, 1366, 59 L.Ed.2d 587 (1979), the

> ified, yet not considered, and the job was kept open for others no more qualified than they were. Ford's rebuttal evidence that was rejected sought to articulate a legitimate nondiscriminatory reason for hiring Simpson. I have my doubts that such a case of disparate treatment can be made out, however, where the Court specifically finds no intent to discriminate. "Proof of discriminatory motive is critical [to proof of disparate treatment under McDonnell Douglas] although it can in some situations be inferred from the mere fact of differences in treatment." Teamsters, supra, 431 U.S. at 335 n.15, 97 S.Ct. at 1854 n.15. Direct proof of discriminatory motive is unnecessary if an inference is raised, but once a specific finding of no intent to discriminate is made, that inference is negated. The District Court could have inferred discriminatory intent from Ford's failure to interview the women, but once the Special Master found Ford did not intend to discriminate, that inference of discrimiatory motive was dispelled. "A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained are more likely than not based on the consideration of impermissible factors." Furnco, supra, 438 U.S. at 577, 98 S.Ct. at 2949. I do believe, however, that EEOC's statistical showing of disparate impact on women of Ford's policy, as evidenced by their total exclusion from the warehouse until 1975, combined with Ford's practices of using subjective criteria and allowing employees to update applications and recommend applicants made out a case of discriminatory impact, one very similar to that found by this Court in W. T. Grant Co., supra, at 549-50.

Court wrote, "The District Court's express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination." However, the burden only shifts back to the plaintiff, EEOC, to prove pretext if Ford successfully rebutted the inference of discrimination raised by the EEOC. If Ford did not rebut the prima facie case successfully, there is no need to reach the stage of proving pretext, a proof EEOC admittedly would have been barred from making by the Special Master's finding.

Back Pay: Actual or Hypothetical Work Record

The discrimination by Ford in hiring Simpson only resulted in the denial of one vacancy to all the women applicants. Seven women appeared before the Special Master and established that they applied and

were qualified for the job. I agree with the decision at the lower level to divide one award among the seven, although I would add Zettie Smith and divide it eight ways if she were determined on remand not to have been discriminated against in 1971. I disagree, however, with the method used to measure the size of that award.

Title VII cases use two measures for damages, although I can find no case explicitly setting out how and when each is used. Implicit in most cases, nevertheless, is that two lines of employment progress are traced to determine what the victim would have earned "but for" the discrimination, and damages are cut off if either ends: first, the length of service on the job with defendant company of the successful applicant and second, the availability, for employment of the victim of discrimination who was illegally denied that job. See, e.

g., White v. Carolina Paperboard Corp., 564 F.2d 1073, 1084-1089 (4th Cir. 1977). To see how long the victim would have lasted in the job, the successful applicant's service with defendant company is measured. If he is laid off and not recalled, at that point, the job that was denied the victim no longer exists and the victim's compensation ends, even if the victim was still available for hire. The records of all victims denied jobs also are examined to see if they were always available for hire; if not, back pay is cut off even if the successful applicant is still on the job.[12] As the majority here

12 In N.L.R.B. v. Local No. 2 of United Ass'n of J. & A. of P. &P. I., 360 F.2d 428, 434 (2nd Cir. 1966), the court ordered the Board to determine, before awarding back pay, "the length of time [the employer] would have kept the four [applicants] at work" had they been hired, which in part depended on their ability to do the work and in general on "their employability, since they were never put to work." Only actual losses should be made up since "back pay is not a punitory award for having been the victim...., it rests on the right to have has the work and presupposes the ability to do it." Id.

points out, courts at times must hypothesize a work record to determine how long a victim would have worked "but for" the discrimination practiced against him, but it fails to point out that where such hypothesis is required is in class-action suits involving large-scale denial of jobs or promotions or transfers over a long-period, E.g., United Transportation Union, supra, at 341 (Winter, J.), and Hairston, supra, at 232-33 (Winter, J.). In such cases, a specific individual who took each victim's opportunity cannot always be identified so that his work

Inquiry should be made on how long the applicants, "on the basis of their ability and other factors would have been kept at work by" the employer. Id. (emphasis supplied). The Special Master in this case looked into whether each woman's qualifications were sufficient to be considered for the job, but he did not attempt to determine how long each would have kept the job, based on her abilities, had she been hired instead of Simpson, or whether each woman's performance would have been good enough to have been rehired, unlike Simpson, even after her recall rights had expired. See Ford warehouse manager's testimony on recall, infra, at 196.

record can be followed, which forces the court to come up with a hypothesis as how long each victim would have continued with the company had he been hired or promoted. Such a hypothetical employment history is unnecessary to remedy individual instances of discrimination, as in this case where the identity and work record of the actual successful applicant is known. Even in a class-action suit with numerous claimants, this court overturned an award by Judge McMillan because he resorted to an average or hypothetical difference between earnings by blacks and whites during the critical period rather than determining each award on the individual facts. Carolina Paperboard, supra. For example, if one of the victims would have been qualified to progress to a tender's job by 1968, when another person was hired for the job, this circuit said he was to receive the difference

between his own low wage and a tender's wage, up to 1975—"[a]ssuming the tender hired in 1968 remained in the job until 1975...." Id. at 1085. (emphasis supplied). A court is then to use the successful applicant's actual work record, ending back pay for the discriminatee when the job holder leaves the company's employ.

The lower court used that actual record here, that of Simpson, the successful applicant, but departed from it when he was laid off, at which time the victims' back pay would have ceased. At that point, the court switched to a hypothetical record, arguing that, had one of the victims been hired instead of Simpson, she would have been recalled in 1975, even though Simpson was not. The facts are that, after Simpson's layoff Ford had no vacant slot until 1975, after Simpson's recall rights had expired, when it hired Doris Baumgardner, a

female. The court said it based its surmise that a victim would have been recalled on evidence that Ford's custom was to rehire former employees even after they lost their recall rights. That surmise is, in fact, contrary to the evidence. The only pertinent proof was the testimony of Ford's former warehouse manager that no such custom existed: "Sometimes we do and sometimes we don't. It depends. I would say the majority of the times, we did recall them." App. at 1041. The witness then stated that it would depend upon the performance of the employee and other factors such as the desire to return to Ford and, if the employee is leaving another job, whether there is a reasonable likelihood that the job with Ford would be permanent which assurance Ford could not give. Id. at 1042.

In an analogous case the Second Circuit rejected a back pay award under NLRA

that involved less surmise than here. The Board in N.L.R.B. v. R.K. Baking Corp., 273 F.2d 407 (2d Cir. 1959), cert. denied, 363 U.S. 804, 80 S.Ct. 1239, 4 L.Ed.2d 1148 (1960), followed the successful applicant's actual case history to determine how long the victim would have continued in the company's employ. The discriminatee was illegally denied a temporary job and one Greenberg was hired. After Greenberg's temporary job ended, he was actually given the next permanent vacancy "on the basis of prior employment by R.K.as a temporary relief man", id. at 410. The Board assumed that the discriminatee would also have gotten that permanent job opening had he, instead of Greenberg, been awarded the temporary job. The Second Circuit rejected this reasoning because the company was not required to hire Greenberg but simply decided to do so voluntarily:

"[A]bsent evidence of a seniority system enforceable by ex-employees, whether [the victim], but for the refusal of the temporary job ... would have been subsequently employed by R.K., still remains a matter only of conjecture." Id. at 411 (emphasis supplied).

The lower court here used even more invention. The Board, in R. K. Baking Corp., had taken the company's actual treatment of the successful applicant and assumed that the victim would have fared as well, whereas the district judge here rejected what actually happened to Simpson, assuming that the company would have acted differently toward the victims. The Board's assumption that the company would have treated the victim the same as it actually treated the successful applicant was far less of a departure from the given facts than was made by the lower court

here, yet the Second Circuit rejected it, saying, "[T]his appointment, so far as the evidence shows, was due only to the fortuitous circumstance that he was available and qualified—not because of any rights of seniority entitling him to the job ... [T]he respondent employer was entitled to fill the position by anyone it chose—whether theretofore employed or not." Id. at 411 (emphasis supplied).

This court, should reverse the award as pure fantasy opposed to the given facts, for the same reasons stated by the Second Circuit: "[T]he evidence fails to show that these drastic remedies as applied in favor of this complainant, who never was an employee of the respondent are necessary to make him whole for the discrimination practiced against him in refusing employment." Id. at 410. Simpson's actual work history should not be ignored: Back pay

should be ended on August 6, 1975, when his recall rights ended, or, at the latest, on September 22, 1975, when Doris Baumgardner was hired.

Additional Remedy

The usual remedy for victims of Title VII discrimination includes reinstatement, but I do not see it as an abuse of discretion for the lower court to have denied that relief here and would not remand for reconsideration which, in effect will compel the lower court to order reinstatement and additional back pay. Gaddis and Starr, in my opinion, have already turned down valid job offers for Ford, and there is no reason to continue to penalize Ford with back pay until it makes the fruitless gesture of offering the same jobs to women for the second time. To order Ford to make offers to the seven—or eight, if Smith is added—victims of discrimination in 1973 as jobs become

available is too heavy a burden to put on Ford especially in light of its recent affirmative action efforts.[13] To tie Ford's hands so that it cannot make its own selections of employees for the next seven or eight openings, perhaps dragging out for years, seems too harsh a remedy for one discriminatory act, not even an intentionally discriminatory one. Although the District Court's discretion in fashioning a remedy in a Title VII violation is not "unfettered by meaningful standards or shielded from thorough appellate review," that remedy is left in the first instance to the district court. Albemarle, supra, 422 U.S. at 416, 95 S.Ct. at

13. Since this litigation arose, and even prior thereto, Ford has had an affirmative action program. True, it may not have been effective when this litigation arose, but it has been made effective since that date. For example, the last six warehouse jobs, filled since 1975, have gone to four women and two black males. A recent class-action case has been settled by Ford paying a very substantial sum for the benefit of the class. I have no knowledge as to whether the present claimants are included in, or excluded from, the class.

2371. I believe that valid reasons exist for denying reinstatement, that the District Court did not abuse its discretion in not so ordering, and I therefore would not remand for the lower court to articulate the reasons for its denial, as such will almost inevitably make the court feel pressured to order reinstatement and grant additional back pay.

Conclusion

In summary, I would uphold all findings of discrimination except that pertaining to Zettie Smith in 1971, which I would either reverse as clearly erroneous or remand for further fact finding as to the 1971 applications. I would uphold the grants of back pay to each, although adding Smith to the group sharing the award for the 1973 violation, but I would end the award to each with the victim's accepting permanent employment, removal from the job market, refusal of a valid job offer by Ford, or with

the successful applicant's loss of the disputed job with Ford. I would not remand for the District Court to reconsider whether to offer reinstatement and continue back pay indefinitely.

If the District Court's decision not to order Ford to offer employment to the ten women involved here is upheld, it follows that there is no need to extend their back pay until the women are given an opportunity to accept or reject such offers. As noted earlier, if on remand the court reconsidered under the pressure of the majority's opinion and prolonged back pay, Gaddis, Starr, and Smith would collect over three years' extra back pay and over three years' worth of salary would be added to the seven womens' joint award, increasing Ford's liability by perhaps $100,000 beyond the already overly generous grant the District Court felt was appropriate. The award

would be out of all proportion to the discriminatory acts committed by Ford.

I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff,*	)	
-v-	)	Civil Action No. C-C-75-231
FORD MOTOR COMPANY, *Defendant.*	)	

JUDGMENT

This action having come on for trial before the court sitting without a jury, and the issues having been duly tried, and findings of fact and conclusions of law having been entered.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Judgment in this cause is entered against defe dant Ford Motor Company (hereinafter referred to as "Ford") consistent with the court's findings of fact and conclusions of law filed on December 30, 1977, as modified by the court's order approving the report of the special master filed on March 21, 1979.

2. Within thirty (30) days after the entry of this judgment, Ford shall make payments to the following discriminatees in the follow- ng amounts, plus six percent (6%) interest thereon from January 1, 1978:

Judy Gaddis	$42,355.43
Zettie Smith	30,718.61
Rebecca Starr	46,488.07
Gloria Gaither	2,607.24
Betty Erwin	2,593.53
Estate of Mary Luckey	4,608.22

Frances McGinnis Gantz	$3,171.22
Mary Cox	3,444.60
Arlene Brown	3,528.21
Frankie Benson Grier	3,103.83

3. Plaintiff shall recover its costs in this action from Ford.

4. This court shall retain jurisdiction of this matter to issue such other orders and to conduct such other proceedings as may be necessary to effectuate the purposes of this judgment, and this judgment shall continue to be effective and binding on Ford.

SO ORDERED this 7 day of May, 1979.

/s/ JAMES B. MCMILLAN

JAMES B. McMILLAN
UNITED STATES DISTRICT JUDGE

EEOC v. FORD MOTOR CO.

U.S. District Court,

Western District of North Carolina

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. FORD MOTOR COMPANY, No. C-C-75-231, December 30, 1977

M. James Hunter, (Atlanta Regional Office of General Counsel), for plaintiff.

Richard A. Vinroot (Fleming, Robinson & Bradshaw), Charlotte, N.C., for defendant.

McMILLAN, District Judge: — This case was tried without a jury before the undersigned United States District Judge beginning April 22, 1977. The court, having heard the evidence and examined and considered the exhibits tendered by the parties, makes the fol-

lowing findings of fact and conclusions of law:

Findings of Fact

1. This suit was commenced by the Equal Employment Opportunity Commission (hereafter, "the plaintiff" or "the Commission"), pursuant to § 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) (hereafter, "the Act"), seeking relief for violations of § 703(a) of the Act, 42 U.S.C. § 2000e-2(a).

2. Defendant Ford Motor Company (hereafter, "the defendant" or "Ford") is a corporation organized under the laws of Delaware and doing business in North Carolina.

3. Defendant maintains and operates an automotive parts distribution facility in Charlotte, Mecklenburg County,

North Carolina.

4. Defendant is and was at all material times an employer engaged in an industry affecting commerce within the meaning of § 701(b) of the Act, 42 U.S.C. § 2000e(b).

5. The claim out of which the suit arose was a charge of sex discrimination filed with the Commission by Judy Gaddis on September 10, 1971, and amended on June 5, 1973.

6. The suit was filed on July 21, 1975, more than thirty days after the filing date of the charge and subsequent to the Commission's inability to secure a conciliation agreement acceptable to the Commission.

7. Ford's Charlotte parts distribution center receives, stores, classifies and ships parts and accessories to dealers, parts supply houses and others. The fa-

cility is divided into office, traffic, and warehouse departments. Each department makes its own personnel decisions.

8. New employees in the warehouse begin as general warehousemen or as "picker-packers." These latter employees "pick" ordered parts from their storage and "pack" them for shipment.

9. Ford does not recruit job applicants for the warehouse; it has had in the past more "walk-in" applicants than it needed. The stated policy is to provide an application for employment to every person who requests one. Applications are generally returned by applicants to one of several receptionists at the facility who then forwards them to the appropriate department manager.

10. Ford's criteria for hiring "picker-

packers" are very subjective. Although Ford contends that similar past experience is an important factor, the speed with which a new employee is expected to learn and usually does learn how to perform his job demonstrates that such past experience is not an essential job qualification. In addition to past experience and education Ford considers such factors as "promotability," how an applicant will "fit in," and the applicant's "general demeanor."

11. The stated practice in the warehouse (which is not always followed) is to file applications chronologically according to date of submission and to retain them on "active" status for six months. They are thereafter placed on "inactive" status for an additional six months and discarded at the end of one year. If an applicant expresses con-

tinued interest in employment during the "inactive" status period, Ford will return his application to the "active" file. Applicants are not informed of this practice.

12. When vacancies in the warehouse occur, the operations manager for the warehouse will pull from the "active" file what he considers to be a sufficient number of applications by qualified candidates, taking the earliest filed applications first. He will then arrange for interviews and select those he personally judges to be best suited for employment.

13. In June, 1971, a woman named Zettie Smith applied at Ford for a job in line with her prior experience as a stock handler and shipper in a Charlotte textile plant. She was the first woman to apply for a warehouse job at Ford, al-

though Ford frequently hired women into clerical positions in the office. Even though she applied before at least one man who was subsequently hired into the warehouse and although she was qualified to be employed in the warehouse, her application was never seriously considered because she is a woman.

14. On May 18 and June 7, 1971, respectively, men named J. A. Blanchard and P. E. Coe applied to work in the warehouse. Both men had prior related experience, Coe as a packer with a local division of Homelite (chain saw manufacturers) and Blanchard in a parts department of a Ford dealership. On July 13, 1971, a man named H. A. Rogers, who had approximately eleven months' experience as a "picker-packer" at the General Motors parts ware-

house in Charlotte, applied for a job with Ford.

15. On July 21, 1971, Judy Gaddis and Rebecca Starr, both of whom had ten months' experience as "picker-packers" at the Charlotte General Motors warehouse, applied for positions in the warehouse. Because of their experience, each was qualified to work at Ford as a "picker-packer."

16. Gaddis and Starr were given application forms by a receptionist at Ford who told them in substance that Ford did not hire women to work in the warehouse. They were informed, however, that their applications would be taken and referred to the operations manager.

17. On August 5, 9, and 16, respectively, Blanchard, Rogers and Coe began to work in the Ford warehouse. Their per-

sonnel records also show that they were hired on those dates, although there was evidence that each had been offered his job some time before the actual date of hire shown. All three of the men were given jobs as "picker-packers."

18. At least two of the men employed in August — Coe and Blanchard — were offered their jobs after Gaddis and Starr applied.

19. On August 30, 1971, a man named P. K. Parks was employed in the warehouse as a transferee with several years' tenure and experience in a Ford parts warehouse in another city. Parks' position was specially created for him.

20. Gaddis and Starr were first interviewed by the warehouse manager at some time after the first three August, 1971, hires. They were interviewed only

following telephone requests from Gaddis.

21. Ford did not hire again after August, 1971, until November, 1972, when Gaddis and Starr and four men named Brown, Indhara, Martin and Shytle were hired to work for six weeks as temporary employees to help with a reorganization at the Ford warehouse. Gaddis and Starr were called to work without any further interviews or applications.

22. Both women picked and packed for less than three of their six weeks, but they performed in an acceptable manner. The remainder of their time was spent in other activities involved in the reorganization.

23. All six temporary employees were terminated in late December, 1972, at the conclusion of their assignments.

24. Ford did not hire anyone into the warehouse from December, 1972, until July, 1973. In the latter month one of two jobs which had become vacant was offered to David Martin, one of the temporary employees from 1972. Martin had performed more efficiently than the other temporary employees, and Ford's failure to offer the position given him to Gaddis or Starr was not based on their sex. Martin accepted the position.

25. Ford offered the other available position first to Gaddis (whose performance in late 1972 was superior to that of Starr) and then to Starr. Both refused the offer, which was to hire one or the other but not both.

26. The offer to the two women was made after Ford learned that a charge of sex discrimination had been filed

with the Commission (and was prompted by a desire to bring some women into the warehouse in response to the charge); it was refused by both women since they were at that time back at work in the General Motors warehouse, having been recalled to work in January, 1973. Neither woman wished to lose accrued seniority at General Motors, and neither wanted to be the only woman employed in the Ford warehouse.

27. Ford did not fill the second position until August 27, 1973. It was then offered to a man named Robert Simpson, who had not previously worked at Ford, had no prior warehouse experience and had filed his application in 1971. Since filing his application, Simpson had done nothing to update it. His selection indicates that Ford's practice

of holding applications for six months and then placing them on inactive status was not uniformly followed.

28. Between November 9, 1972, and May 21, 1973, ten other women applied to work in the Ford warehouse: Gloria Gaither, Betty Erwin, Judith Lance, Mary Luckey, Frances McGinnis (now Gantz), Mary Cox, Deanna Simpson, Johnny Lockhart, Arlene Brown, and Frankie Benson. In addition, Zettie Smith re-applied during the period.

29. None of these women had applied before the temporary hires were made for November, 1972. Several of them had experience which was clearly related to work in the Ford warehouse and which qualified them for the position filled in August, 1973.

30. Ford did not have any openings after those filled by Martin and Simp-

son until September, 1975. From that date to the present Ford has hired seven people into the warehouse, five of whom are women and two of whom are black men. The women hired after September, 1975, are the first permanent women employees in the Ford warehouse.

31. Ford has maintained a long-standing, company-wide affirmative action program covering all aspects of its employment policies. There is no evidence that the discrimination which occurred in the Charlotte warehouse from 1971 to 1973 represents any general failure of the company's affirmative action program.

32. Smith, Gaddis and Starr have each had other employment from time to time since August, 1971. Gaddis and Starr have each received unemploy-

ment benefits and other compensation from General Motors during times since August, 1971, when they have been unemployed. In 1974, both of these women entered nursing school. The men hired by Ford for the positions the three women were not hired to fill have been subjected to layoffs from time to time since August, 1971.

Conclusions of Law

1. The court has jurisdiction of this action under § 706(f)(1) and (f)(3) of the Act, 42 U.S.C. § 2000e-5(f)(1) and (f)(3).

2. Defendant Ford is an employer within the meaning of § 701(b) of the Act, 42 U.S.C. § 2000e(b).

3. The Commission is authorized to institute this action by § 706(f)(1) of the Act, 42 U.S.C. § 2000e-5(f)(1). All procedural requirements of §§ 706(b) and (f)(1) of the Act were met, 42 U.S.C.

§§ 2000e-5(b) and (f)(1).

4. The relevant time period for determining defendant's liability under the Act is from one hundred and eighty days prior to the filing of Ms. Gaddis' first charge, United Air Lines v. Evans, 431 U.S. 553, 14 FEP Cases 1510 (1977), until the time of filing the suit. The relevant period for computation of back pay shall be as determined below.

5. Plaintiff has established that Ford discriminated against Smith, Gaddis and Starr on the basis of their sex by failing to employ them in its warehouse in the positions filled in August, 1971. As to these three women, all the elements set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973), have been established. Plaintiff has corroborated the proof of discrimination by its showing that Ford

had never hired women into the warehouse until November, 1972, and that the procedures for hiring were vague and were based on highly subjective criteria. Brown v. Gaston County Dyeing Co., 457 F.2d 1377, 1383, 4 FEP Cases 514 (4th Cir. 1973); Young v. Edgecomb Steel Co. 363 F.Supp. 961, 6 FEP Cases 474 (M.D.N.C. 1973). Defendant did not establish a legitimate, nondiscrimintory reason for its failure to hire the three women in August, 1971.

6. Plaintiff has established a prima facie case of discimination by Ford as to the ten women referred to in finding number 28 who applied for work in the warehouse between November 9, 1972, and May 21, 1973. Such discrimination applies to the single position filled by Ford when it employed Mr. Simpson on August 27, 1973.

7. Smith, Gaddis and Starr are entitled to awards of back pay for a period beginning in August, 1971. The period of computation of back pay for Ms. Smith shall extend to the date of these findings. The period of computation for Gaddis and Starr shall extend at least until such time as they entered nursing school. Eligibility for Gaddis and Starr shall extend beyond that time only if they did not, after entering school, remove themselves from the labor market and cease to look for employment. Taylor v. Safeway Stores, Inc., 524 F.2d 263, 11 FEP Cases 449 (10th Cir. 1975). In no event shall their eligibility extend beyond the date of these findings and conclusions.

8. Interest on the back pay awards is assessable at the rate of six per cent (6%) per annum, compounded.

9. Back pay due the three women shall be determined by reconstructing the probable employment history of each woman, assuming she had been hired for one of the positions filled in August, 1971, by Messrs. Blanchard, Coe and Rogers. They shall be entitled to the difference between the amount they would have earned had they been hired in August, 1971, and the amounts actually earned or reasonably earnable by them during the same period. White v. Carolina Paperboard Corp., 564 F.2d 1073, 16 FEP Cases 44, No. 75-2266 (4th Cir., September 23, 1977); United Transporation Union Local No. 974 v. Norfolk & Western Ry., 532 F.2d 336, 11 FEP Cases 410 (4th Cir. 1976).

10. Back pay due to Gaddis and Starr shall not be affected by their refusal to accept the single position of-

fered them in July, 1973, inasmuch as neither would have been confronted by that decision and its implications had both been hired in August, 1971. Cf. Brown v. Colman-Cocker Co., 10 EPD ¶ 10,4,93, 16 FEP Cases 1046 (W.D.N.C. 1975).

11. Smith, Gaddis and Starr are entitled to inclusion of any additional compensation, such as overtime or vacation pay, and any fringe benefits which would have accrued during their periods of eligibility. State unemployment compensation received shall not be deducted from the amount of back pay due. Ford should not be entitled to credit for contributions to the unemployment insurance system made on behalf of these women by other employers. More generally, awards of back pay under Title VII should not be af-

fected by a system of compensation which is designed to serve a wholly independent social policy. Tidwell v. American Oil Co., 332 F.Supp, 424, 3 FEP Cases 1007 (D.Utah, 1971); cf. NLRB v. Gullett Gin Co., 340 U.S. 361, 27 LRRM 2230 (1951).

12. In light of Ford's good faith efforts to employ women in its warehouse since September, 1975, there is no need for general affirmative relief. Ford shall be required to file reports with the court in March, 1978, September, 1978, and March, 1979, setting forth the number of warehouse vacancies occurring in the Charlotte facility during the preceding six months, and the name and sex of all persons hired to fill them. A copy of such reports is to be mailed to the plaintiff, in care of its counsel fo record.

13. Questions concerning entitlement to and the appropriate amounts, if any, of back pay due the women named in finding number 28 shall be referred to a special master under Rule 53, Federal Rules of Civil Procedure. The master shall determine whether, what amounts, and to whom any back pay should be awarded. The master shall also take evidence on the computation of back pay owing to Smith, Gaddis and Starr. A separate order of reference will be entered.

14. Judgment is deferred until receipt of the special master's report.

15. The plaintiff is entitled to recover its costs.

Joint Appendix

Office - Supreme Court, U.S.
FILED
DEC 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-300

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FORD MOTOR COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 14, 1981.
CERTIORARI GRANTED NOVEMBER 9, 1981.

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CIVIL DOCKET
UNITED STATES DISTRICT COURT

LISTING OF RELEVANT
DOCKET ENTRIES

Dated	No.	Proceedings No. C-C-75-231
7-21-75	#1	Complaint
8-13-75	#4	Extension of Time to Answer or otherwise Plead
3-17-76	#8	Def's Motion to dismiss and *ANSWER* to complaint
6-28-76	#15	ORDER (JBM) — Deft's motion to dismiss and for more definite statement denied.
10-1-76	#19	ORDER (JBM) — deft's motion to dismiss is denied, without prejudice to renewal in the form of a motion for S. J. should the parties develop evidence on the issue.
4-22-77		Non-Jury Trial (2 witnesses)
4-25-77		Non-Jury Trial cont'd. (1 witness)
4-26-77		Non-Jury Trial cont'd. (12 witnesses)
4-27-77		Non-Jury Trial concluded. (1 witness) P. to submit proposed findings of fact & conclusions of law.
12-30-77	#25	FINDINGS OF FACT AND CONCLUSIONS OF LAW — JBM
1-10-78	#26	ORDER OF REFERENCE — JBM
2-3-78	#27	MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW, by deft.

Dated	No.	Proceedings No. C-C-75-231
2-7-78	#29	ORDER (JBM) — Defendant's Motion to amend findings of facts, #27, is denied.
9-25-78	#40	SPECIAL MASTER'S REPORT by William E. Underwood
3-21-79	#51	ORDER APPROVING REPORT OF SPECIAL MASTER (JBM)
5-8-79	#52	JUDGMENT — (JBM)
6-6-79	#55	NOTICE OF APPEAL, by deft Ford Motor Company.
7-2-79	#58	APPEAL NOTICE by pltf EEOC — Cross-appeal
7-25-79	#59	Clerk's Certificate

CIVIL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LISTING OF RELEVANT
DOCKET ENTRIES

Dated	Proceedings No. 79-1515
3-19-81	Opinion
4-2-81	Petition for Rehearing and Suggestion for Rehearing En Banc.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

FORD MOTOR COMPANY,

Defendant.

FILED
CHARLOTTE, N. C.
JULY 21, 1975
U.S. DISTRICT COURT
W. DIST. OF N. C.

CIVIL ACTION NO. C-C-75-231
COMPLAINT

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 451, 1343 and 1345. This is an action authorized and instituted pursuant to Section 706(f)(1) and (3) and (g) of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. Section 2000e, *et seq.* (Supp. II, 1972), hereinafter referred to as "Title VII."

2. The unlawful employment practices alleged below were and are now being committed within the State of North Carolina and the Western District of North Carolina.

PARTIES

3. Plaintiff, Equal Employment Opportunity Commission (hereinafter, the "Commission"), is an agency of the United States of America charged with the administration, interpretation and enforcement of Title VII and is expressly authorized to bring this action by Section 706(f)(1), 42 U.S.C. Section 2000e- 5(f)(1).

4. Since at least July 2, 1965, Defendant, Ford Motor Company (hereinafter, the "Company"), has continuously been and is now a Delaware corporation, doing business in the State of North Carolina and City of Charlotte, where it is engaged in distribution of automobile parts, some of which have been shipped from other states and has continuously and does now employ more than twenty-five employees.

5. Since at least July 2, 1965, the Company has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Section 701(b), (g) and (h) of Title VII, 42 U.S.C. Section 2000e- (b), (g) and (h).

STATEMENT OF CLAIM

6. More than thirty (30) days prior to the institution of this lawsuit, a person claiming to be aggrieved filed a charge with the Equal Employment Opportunity Commission alleging a violation of Title VII by Defendant. All conditions precedent to the institution of this lawsuit have been fulfilled.

7. Since July 2, 1965, and continuously up until the present time, Defendant Company has intentionally engaged in unlawful employment practices at its Charlotte Parts Distribution Center facility in Charlotte, North Carolina, in violation of Section 703(a)(1) of Title VII, by failing and refusing to hire women because of their sex.

8. The effect of the policies and practices complained of in paragraph 7 above has been to deprive women of equal employment opportunities and otherwise adversely affect their status as employees because of their sex.

PRAYER FOR RELIEF

WHEREFORE, The Commission respectfully prays that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, agents, employees, successors, assigns and all persons in active concert or participation with it, from engaging in any employment practice which discriminates because of sex.

B. Order Defendant to institute and carry out policies, practices and affirmative action programs which provide equal employment opportunities for women, and which eradicate the effects of past and present unlawful employment practices.

C. Order Defendant to make whole those persons adversely affected by the unlawful employment practices described herein, by providing appropriate back pay, with interest, in an amount to be proved at trial and other affirmative relief necessary to eradicate the effects of unlawful employment practices.

D. Grant such further relief as the Court deems necessary and proper.

E. Award the Commission its costs in this action.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
Charlotte, North Carolina

File No. C-C-75-231

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

FORD MOTOR COMPANY,

Defendant.

MOTION TO DISMISS
AND ANSWER

(Filed March 17, 1976)

The defendant responds to the complaint in this action as follows:

MOTION TO DISMISS

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, the defendant moves that this action be dismissed on grounds that it concerns matters which have not been properly processed before and by the plaintiff as required by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* (1964), as amended; and, upon information and belief, it concerns claims for individuals which are barred by the three-year statute of limitations applicable to such claims in North Carolina.

ANSWER

1. The allegations of paragraphs 1, 2, 3, 6, 7 and 8 are denied.

2. The allegations of paragraphs 4 and 5 are admitted.

WHEREFORE, the defendant prays that (a) this action be dismissed, (b) the plaintiff have and recover nothing from the defendant, (c) the injunctive relief sought by the plaintiff be denied, (d) the defendant's costs and attorneys' fees incurred in defending this action be taxed to the plaintiff and (e) that the defendant have such other relief as the Court may deem appropriate.

FLEMING, ROBINSON & BRADSHAW, P.A.

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UNITED STATES DISTRICT COURT
TESTIMONY FROM
TRIAL PROCEEDINGS

DIRECT EXAMINATION OF JOHN KAIM

* * *

[9] Q. But you do maintain applications.

A. Yes, sir, absolutely.

Q. You're limiting me in your answer to the warehouse. Is that also the situation in the other two departments?

A. Basically, it's the same system. We'll have in the office either mailed-in applications for salary jobs or walk-ins, and we just file them, and we'll have the same system there, slightly different. We'll have 1977 files and 1976 files and so forth.

Q. For what period of time do you maintain those appli- [10] cations.

A. Probably in the office area we hold onto them a lot longer than we do in the warehouse. We have far less applications there.

Q. Could you give me a period of time?

A. We probably have some going back to 1975. It's a very small file.

Q. That's a one-two year period.

A. That's correct.

Q. Would you have them beyond 1975?

A. I'm not certain, not on the salary.

Q. There is no policy to distroy [sic] those applications at a certain time?

A. No specific policy to hold them.

COURT: What is the policy with reference to how long you preserve applications for warehouse jobs?

A. I'm not sure that there is one, Your Honor.

COURT: What do you do in fact?

A. We hold them in the active file one year. When I say active, I mean . . .

COURT: I'm asking about the warehouse.

A. Warehouse, six months active, six months inactive.

COURT: What happens to it after six months in the inactive file?

A. We dispose of them.

[11] COURT: How long has that been the practice?

A. As far back as I can remember.

Q. I'm sorry, Your Honor, I thought I heard the last question. Was that how long has that policy been in effect?

A. As far as I can remember. We may have applications that go beyond a year. People do call us and update their applications.

Q. Since you were employed as Depot Manager in 1973, and since you also worked there previously in 1971, would that have been the policy to your knowledge?

A. Exactly the way I used to do the hiring. I kept an active file and an inactive file, but we had far less applicant flow in those days. I don't think I had more than 30 at a time. We have hundreds now.

* * *

[45] MR. VINROOT: May I suggest that he give the affidavit to Mr. Kaim and let him read it and ask him any questions he has. It might save some time.

COURT: If you're offering it, I'll receive it into evidence and will allow you to read it.

MR. HUNTER: Yes, sir, I'm offering it into evidence and, if I may, I'll read from the second paragraph as well as I can. It's not a clear copy. When an applicant applies for a job, they will see the receptionist at the desk, who will give the applicant an application. The application can be filled out in the company, mailed back or brought back. The receptionist will call the Warehouse Manager who may or may not interview the applicant. If there are no vacancies, there is no interview by the Warehouse Manager. The next paragraph, when a vacancy occurs, we will go back to the active file and pick the oldest [46] application and contact the person to see if they are still available or interested.

Skipping down to the last sentence, Your Honor, once a male or female demonstrates to us that they cannot perform the duties, then an attempt will be made to place them on another job.

And on the last page, walk-ins and plant referrals are how we get our applicants.

Q. Do you remember that statement, Mr. Kaim?

A. Yes.

Q. Is that still the policy at the Ford Motor Company's Parts Distribution Center?

A. I think the only thing that I would see that, even at the time, would not have been exactly correct would be that we would go back and pick the oldest application. I think we would go back to the active file and review all the older applications. If we were searching for females, we would look for females and qualifications and experience as well as males.

Q. Does that policy. . .

A. What I'm saying here is that this is a very, very brief statement. It didn't tell the whole story of what we do when an applicant comes in for a job.

Q. Why don't you tell me again exactly what is done.

A. Well, I think we'd go an extra step. Everything prior to that is probably the way, is the way it is even today. The same receptionist system is in existence, but if we had an open- [47] ing we would go back and review our active file, which is the most recent six months, and we would be searching in there for, meeting our goals in AAP, we would be looking for experience, we would be looking for qualified people wherever we can.

* * *

CROSS EXAMINATION OF JOHN KAIM

* * *

[67] Q. In November of 1972 when you hired Ms. Gaddis and Ms. Starr, their applications also were more than one year old at the time, were they not, their having applied in 1971?

A. That's correct.

Q. Sometime in July. Why were their applications still considered for that temporary work?

A. I would have to repeat what I heard from Mr. Miller, that they just persisted and they just called constantly, I be- [68] lieve.

Q. So their applications were likewise treated as renewed applications because of their continual calling.

A. That's exactly right.

Q. Is it your testimony that when someone does go after a position and stays after it on the phone and what have you, you don't follow your six months rule or six months practice; that is, you give some consideration to that persistence?

A. That's correct, at least to the extent that we consider it current.

Q. I suppose that would be consistent whether you consider those people qualified.

A. That is also correct.

* * *

DIRECT EXAMINATION OF KEN ELY

* * *

[95] Q. Can you explain to the Court exactly what happens when a applicant comes to apply for a job in the warehouse?

A. Well, they come into the lobby, request an application, say it's for the warehouse, and request an application for an hourly job. A register is annotated with the name and whatever other information is required. The application is completed [96] normally at that time on the premises, submitted to the individual that is there that passed out the application, and then the application is forwarded, assuming it's an hourly, forwarded to my office for my review and filing.

Q. Do you interview those applicants?

A. No, not generally. There is really no need to interview applicants unless we have an opening.

Q. So, it's your statement that interviews are not given to any applicants.

A. That is not my statement. We do interview on a special request. We wouldn't turn an applicant down.

Q. When there is a vacancy in a job, what happens?

A. We research the current applications, six months. We check and see the various things we are looking for, experience, date of application, all other criteria. We select from that group individuals that meet these criteria, and then we call them, ask them to come by for an interview. Then at the conclusion of the interview or interviews, we make our selection as to what individual that we would like to have on board with us.

Q. Do you also review the inactive applications?

A. No, we don't.

Q. Only the active applications are reviewed.

A. Yes.

Q. And after six months, applications become inactive.

A. Approximately six months, that's correct.

[97] Q. Do you review applications once they are filed?

A. Only in such times as there is a need.

Q. Only if there is a need.

A. Yes.

Q. Do you, at a time of need, do you evaluate those applications and arrange them in some kind of order?

A. We evaluate the applications from, like what I said earlier, and for the type of individual we're looking for, and then we call them in and have an interview with them, and then we make the selection at that time.

* * *

[114] Q. Since you were employed in 1973, July of 1973, and Ms. Gaddis was offered a job during that period of time, were you responsible for the offer of a job to Ms. Gaddis in 1973, Ms. Gaddis or Ms. Starr?

A. Yes, I believe to both of them.

Q. Did you talk to Ms. Gaddis yourself?

A. I don't recall talking to Ms. Gaddis. I do recall [115] talking to Ms. Starr but . . .

Q. Can you relate to the Court the nature of that conversation?

A. I think, my best memory, that Ms. Starr had telephoned the facility, and I intercepted the call, or I believe Ed Massey, my clerk, referred her to me. I think we discussed her employment, and I think that at that time she told me that she wasn't interested in working for Ford Motor Company due to the fact that there were no women employed there, or I guess her friend wasn't available for employment, her friend being Ms. Gaddis. I think this was probably the extent of the conversation. I kind of recall that she said that she had employment, was working for General Motors or maybe she was laid off or something. She did refer to General Motors. I thought at the time that she was employed.

Q. Ms. Starr called you and said she didn't want a job.

A. Yes.

Q. Did you have an earlier conversation with Ms. Starr?

A. To my knowledge, that was my only conversation with her.

Q. Did you inform Ms. Starr that you had a job for her?

A. Yes, she was informed.

Q. How was she informed?

A. It was either by wire or by telephone.

Q. Do you remember what job was available?

[116] A. It would be the warehouseman's job, picking operations.

Q. Do you remember the conversation you had with Ms. Starr?

A. No more detail than what I've already referred to.

Q. You're sure you didn't talk to Ms. Gaddis?

A. I'm not positive. If my memory serves me, the only person I talked to was Ms. Starr. I believe Mr. Massey talked to Ms. Gaddis.

COURT: What year and month are you talking about?

A. Sir, we're talking about July, the latter part of July of 1973.

COURT: Was her call that you received made after, as I understand it, somebody, you say, offered her a job and she called back in response to that offer.

A. Yes, sir, I believe that is the way it was. It was my clerk, Mr. Massey, that I think took care of those details. If I recall, I was brand new at the Distribution Center, and I was in and out trying to get my affairs in order. He helped me out in this respect.

Q. Whose decision was it to call Ms. Gaddis and Ms. Starr?

A. It was my decision.

Q. Why?

A. Well, mainly because we had a suit, EEOC suit filed against us, and we wanted to give one of them an opportunity to go to work for us, and we only had one, maybe two openings at [117] that time.

* * *

[121] Q. Mr. Ely, you indicated in your testimony that you offered a job to one of the women, either Ms. Gaddis or Ms. Starr, [122] in July, 1973. Is that correct?

A. Yes, that's correct.

Q. You also stated that you offered such job because of the EEOC charge which had been filed against Ford Motor Company. Is that correct?

A. That's correct.

Q. Do you remember whether it was Ms. Gaddis or Ms. Starr that you offered the job to first?

A. To the best of my recollection, it was Ms. Starr. What I did, I referred to my notes that I had on the conversation I had on that particular day. My notes indicated, like my memory served me, that it was Ms. Starr that I talked to.

Q. Do you have the date that you talked to her?

A. According to my notes, it was 7-31-73.

* * *

[123] Q. Is it your testimony that Ms. Starr turned the job down?

A. Yes.

Q. Can you recall for me exactly how Ms. Starr turned that job down and indicate also what you indicated to Ms. Starr in offering the job to her.

A. Do you mind if I refer to my notes?

[124] Q. Fine.

A. According to my notes, I talked to Ms. Starr at approximately 2:30 on the 31st, and right before this, I think that Ms. Starr had requested along with Ms. Gaddis an interview with myself regarding the position.

Q. Do you remember what date that was?

A. The request for the interview was 7-31-73.

Q. Okay.

A. Ms. Starr was advised that an interview for that particular day could not take place due to the fact that I was in and out of the office. We were in union negotiations at the time,

also. At that point in time, Ms. Starr, according to my notes, requested to talk to me. I presume Mr. Massey was in conversation with her at that time.

Q. What is Mr. Massey's full name?

A. Ed Massey. According to my notes, she then talked to myself in reference to the opening at Ford Motor Company. This is Ms. Starr. She was told there would be an opening available, and then she told me that she appreciated the opportunity to work at Ford but would have to decline if she didn't want to be the only girl working in the warehouse.

Q. Were those her exact words?

A. According to my notes, those were what she conveyed to me.

Q. You indicated that you told Ms. Starr there would be [125] an opening available. Did you give her some kind of date that the position would be open?

A. I would have to assume that it was conveyed to her that it would be an immediate position.

Q. Did you make a definite commitment to Ms. Starr to place her in that opening when it did occur?

A. Do what now?

Q. Place her into that position when the opening occurred?

A. I believe so. I believe we did this by way of a communication by telephone or by wire, the kind of normal procedure that we used in that particular period of time.

Q. Again, Mr. Ely, did you ask Ms. Starr, inform Ms. Starr exactly what the job would entail, the exact job title of that job?

A. I don't believe that I made any reference to, with that conversation, my only conversation with Ms. Starr, as to what the job would entail.

Q. I don't know if you indicated whether that communication with Ms. Starr was by phone or in person?

A. That was, according to my notes, by phone.

* * *

[127] Q. Can you tell me, Mr. Ely, exactly why Ms. Starr or Ms. Gaddis was offered the job? Was it because of their qualifications or because of the EEOC charge?

A. Well, it's difficult to pinpoint exactly. Like I said just a little while ago, it was an offer made in good faith on account of the EEOC case.

* * *

[129] Q. What were your instructions to Mr. Ed Massey regarding that one position and the two women, Ms. Gaddis and Ms. Starr?

A. I don't recall exactly what my instructions would be at that time, only that to communicate with them, so they would have knowledge that there is an opening available to one of them.

Q. Do your notes indicate what transpired between Mr. Massey and Ms. Gaddis regarding that offer of a job?

A. Yes, it looks like there is something to that in here.

Q. Would you tell us what it says?

A. Would you mind if I read it verbatim?

Q. Please.

A. According to Ed Massey, here's the notes that he wrote of that particular time, wire sent 7-26-73 PM advising Ms. Gaddis to report to work on 7-30-73. According to him,

he received a telephone call from Ms. Gaddis on 7-27-73 at approximately 10 AM. She asked why she was being called in. I told her it was due to present quits and possible future retirements. She asked how many people were going to be hired and if Becky Starr would be one of them. I said management decided to fill two openings, and I did not know if Ms. Starr would be called. She stated at the time that she did not like to work there. There [130] were no other women. She asked what would she be doing and if 9:30 to 6 o'clock would be her regular hours. I told her to call back later after I had a chance to ask Mr. Ely about these questions. She also said, I wonder why Ford is doing me this favor since we have the suit against them. Then later on during the day, Ed received a second call from Ms. Gaddis at approximately 1:30 PM, 7-27-73. She asked what I found out. I told her that management was not sure what her regular duties would be, that 9:30 to 6 o'clock would not be her normal hours after she was assigned to normal duties, also that we would have to fill this opening by 7-30-73 or we would contact the next prospect. She said she appreciated the offer but because she would be the only woman in the plant, she thought it best to refuse at this time. I told Ms. Gaddis that according to the wire, she had until 9:30 on 7-30-73 to report to work, and that we would not contact anyone else until then. That is all I have as far as the notes of that particular day.

Q. What was the date of the second entry?

A. 7-27.

Q. Do you know if Ms. Gaddis responded by that time indicated in that note?

A. According to this, she responded on 7-27-73, and she didn't want the job. I don't know if there was any response after that period of time.

Q. Does Mr. Massey's, do Mr. Massey's notes indicate [131] whether or not that was a conference in person or by phone?

A. According to his notes, it was by phone.

Q. Do they indicate that a personal conference was had with Ms. Gaddis?

A. That was had with Ms. Gaddis?

Q. Whether Ms. Gaddis came to Mr. Massey's office and discussed it with him?

A. No.

Q. Mr. Ely, would you recall for the Court again, in order of priority, the criteria you used in evaluating an applicant for employment into the warehouse?

A. We used several — experience, of course we looked at the education, future promotionability. We looked at how, like during an interview, we'll feel that the individual will fit in with the work environment. Of course, initially we start out with the date of application. I believe that, the best that I can remember, those are the most important criteria which we do use in the selection of candidates.

Q. Were those criteria given by you in order? You gave experience-first, education-second, future promotionability-third, and how individual will fit in-fourth.

A. Well, it's really difficult to, going past experience, to rate 3, 4, and 5. They are closely related.

Q. Would you explain to me, Mr. Ely, exactly what future promotionability means?

[132] A. Well, yes, I guess I can. I guess what we look for, maybe a college grad or junior college grad, something of that nature would be a candidate for promotion within the company from one position to another.

Q. Do you think that a college education prepares one to become a parts picker?

A. No, I didn't really mean to indicate that I felt that. I was just looking at future employment possibilities.

Q. Would you consider a person with a baccalaureate degree capable of performing parts picker's duties better than one who has only a high school education?

A. Not necessarily, no.

Q. But that is one of your criteria.

A. It isn't, like I said, #1. It's something you look at.

Q. Can you explain to the Court exactly what you mean by how an individual would fit in?

A. Well, during the interview that I have with employees, new employees, I'll talk to them and try to get a feeling of what type of individual they are. This is just, you know, a portion of the things we look for in how this individual, personality, temperament or whatever, will, how he or she will function with the people personality-wise and so forth in our operation.

Q. Would you draw upon some of your previous experiences [133] in reviewing applications and indicate what matters come to your attention in interviewing these persons that led you to believe that they would not fit in properly? Do you understand my question?

A. I understand the question. I would have a difficult time without, because, you know, the decision obviously, looking at it from that point only, is something that would have to be made . . .

* * *

CROSS EXAMINATION OF KEN ELY

* * *

[139] Q. Did I understand you to testify on direct that in July of 1973, you talked with either Ms. Gaddis or Ms. Starr about a job?

A. Yes, sir, that is correct.

Q. Who was that, Ms. Starr or Ms. Gaddis?

A. According to my notes, that was Ms. Starr.

Q. Would you tell me the circumstances of that conversation with Ms. Starr? I realize you read from some notes. Could you tell me in your own words the circumstances of that conversation?

A. The best I can remember, she was responding to a communication delivered by my office for her to report to work. She called on 7-31-73 and talked to Ed Massey requesting an interview with myself on that particular day for Ms. Gaddis and herself, Ms. Starr. She was advised at that particular time that it could not take place due to the fact that I was in and out of the building, and also we were involved in negotiations with the union.

Q. Was that in fact true? On or about July 31, 1973, were you involved in union negotiations?

A. Yes.

Q. Were you unavailable?

A. That's true, yes.

Q. Had a previous offer of a job been made to Ms. Gaddis [140] before you happened to have a conversation with Ms. Starr on the 31st of July?

A. Yes, sir.

Q. And had she, as far as you know, turned that job offer down?

A. So far as I know she did.

Q. You know firsthand that the same job offer was made to Ms. Starr and she subsequently turned it down.

A. That is correct, yes, sir.

* * *

[142] Q. You said on direct, as I recall, that you made an offer in good faith to the women. Would you explain that a little bit?

A. Well, only that we had knowledge of an EEOC case against us, and we thought that we should offer one of the two girls, being we thought we had an opening at that particular time, and we selected, by her records, Ms. Gaddis first.

Q. Who did you discuss that decision with?

A. I got knowledge from Mr. Miller and Mr. Massey who knew . . .

COURT: Excuse me, gentlemen.

(PAUSE IN THE PROCEEDINGS)

Q. I was asking you, when you said that you offered a job to these women because of the EEOC charge, what you meant by that. Did you mean by that that you were trying to show them you did not discriminate?

A. That basically, that is the answer, yes.

Q. When did you first learn of the charge and who, Ms. [143] Gaddis and Ms. Starr, that Gaddis and Starr were the charging parties charging you with discrimination?

A. It would have to have been in that latter part of that month that I did hear about the charge. I can't pinpoint. I'm sorry.

* * *

[161] Q. There were some questions on direct this morning about promotability, which I believe is your word, regarding educational background and college educational background. What bearing, if [162] any, would that have on your consideration of Simpson or anyone else for a picking job?

A. When we look at education, we want to hire people that can read and write and function. Secondly, we look at education as far as, in terms of promoting this individual to a supervisor or beyond, try to further his career.

Q. Is it your answer that college education is not a necessary qualification for someone who is going to pick and pack in the warehouse?

A. That is correct, it isn't a necessary qualification.

Q. But it is something that you would give consideration to in the hope that they would be promoted to some other position.

A. That is correct, yes, sir.

* * *

[164] Q. There was some questioning this morning on direct about whether or not Ms. Starr was told what her job entailed by you. Were you in fact asked any questions by Ms. Starr about what her job entailed?

A. I don't remember any questions from Ms. Starr in re-[165] gard to what her job contact would be.

Q. Was that even a subject of discussion in your conversation with her?

A. To my memory, no.

Q. Did that concern her at all in your discussion?

A. No, sir.

Q. As I recall your testimony this morning, the reason she wasn't coming was because she was going to be the only woman in the warehouse. Is that correct?

A. That's correct.

Q. There was some discussion this morning on direct about what regular hours she would have. Was that a subject of any concern in your discussion with Ms. Starr?

A. No, sir.

Q. What in fact is your practice with respect to the hours of new people?

A. Of new people in regards to hours, we normally have them come in two, two and a half hours later than the normal starting time. This gives us time to get our crew started, get our workload plan and get in gear, and then we can work with the new people, show them what we want them to do, get their paper work and all this stuff out of the way.

Q. How long does that odd hour shift last for new people?

A. It varies. I would say approximately a week.

Q. Did you explain that to Ms. Starr, if you recall?

[166] A. I don't recall explaining that to Ms. Starr.

Q. Do you recall any discussion about what the regular shift would be thereafter, any questions about that?

A. Not in regard to Ms. Starr.

Q. There was a question on direct this morning about whether or not you had a personal meeting with Ms. Starr or Ms. Gaddis on July 31, 1973. What, if any, personal meeting did you have with either or both of those ladies on that date?

A. The only time I recall seeing both Ms. Starr and Ms. Gaddis was near our shipping dock, at the end of the

shipping dock on, I believe it was the evening of the 31st, around 5:15 or so. I believe they had picked up an application from the front office, had driven back, and as I was over on the shipping dock, I noticed two girls talking to Mr. Rogers at that particular time, and that is when I was, when I found out who they were.

Q. Did you have any conversation with them at all?

A. The best of my knowledge, no. I think I might have said, hi, but that was about it.

* * *

DIRECT EXAMINATION OF FRANK MILLER

* * *

[202] Q. Can you tell us exactly how you went about selecting an applicant once you had an opening for a job?

A. I would review the available applications. If I had one job, I would look at the oldest applications that I had, and when I say oldest, I kept them active about six months. I reviewed the applications I had, selected a candidate whom I thought, candidate or candidates whom I thought would fit the position, call them for the interviews. Subsequent to the interviewing, I would make a selection from the people I interviewed.

Q. You mentioned inactive and active applications. Explain that to me.

A. I normally kept applications active for about six months. After a six months period, I would move them back and retain them for another six months just as a matter of file.

Q. Did the procedure you've just outlined for me, Mr. Miller, concerning the receipt of applications and classification of those applications in the inactive file, ever change during the time period that you were there as Warehouse Operations Manager?

[203] A. I don't think so.

Q. It remained substantially the same.

A. Substantially the same.

Q. Generally, Mr. Miller, can you give us what you looked for in an applicant for a warehouse job, the criteria you deemed important?

A. I would look for age, experience, the ability to read and write. When I say age, I mean eighteen years of age. I looked for prior work experience and their ability to fill out, properly fill out or substantially fill out the application.

Q. Is that in the order that you deemed them most important?

A. I really don't think I could set any most important. I couldn't prioritize them I don't think, Mr. Hunter. I looked at them equally.

* * *

[204] Q. Would you read from the next page, beginning at that sentence?

A. Gaddis and Starr were the only two females hired by me, but I believe other females have filed applications. To the best of my knowledge, other females have filed applications. I can't remember any other females being in the time block when I started hiring. If I should receive female applications, these would be considered as other applicants. When there is an opening, I consider background (work), experience, physical limitations, age (legal age), and handwriting. I then select the applicant I feel is best suited for the position. The applicant is sent for a physical examination and if they pass, they are put on the payroll.

Q. That's good. Would you explain to the Court, Mr. Miller, exactly what you meant by "selecting an applicant best suited for the position"?

A. In the interview process, again, it's a two-phase [205] process. One is looking at the application. Second is the interview. And in the interview, you would talk to the person, get a feeling for their general demeanor, the way they act, the way they present themselves to you, their overall experience in both industrial, total industrial experience as well as auto parts experience. Did I answer that completely?

* * *

[206] Q. Would you go back again, Mr. Miller, and read the first sentence you read on Page 2 of your affidavit?

A. Gaddis and Starr were the only two females hired by me. I believe other females have filed applications.

Q. What did you mean by that statement?

A. Other females had filed applications subsequent or prior to the time the affidavit was taken, sir.

Q. But not prior to the time Ms. Gaddis and Ms. Starr filed applications.

A. That is to the best of my knowledge.

COURT: Are you saying you know they are the first two women who applied?

A. Yes, sir.

Q. What jobs did Ms. Gaddis and Ms. Starr apply for, Mr. Miller?

A. Jobs in the warehouse. That was their application. That's what they asked for, jobs in the warehouse.

Q. Were there jobs open at the time?

A. No, sir.

* * *

[207] Q. Would you, Mr. Miller, track for me exactly what you can recall about Ms. Gaddis' and Ms. Starr's first attempt to seek employment?

[208] A. The first attempt is when they came in and filed an application. Subsequent to that time, they called a couple of times and asked if there were openings.

Q. Did you meet the women on the first date that they applied?

A. No, sir.

Q. What day did you meet them?

A. So far as I know, it was in October, 1971.

Q. How was that meeting made possible? Did you call them?

A. No, sir, Ms. Gaddis called me on several occasions and asked if I was hiring, and I said no, and asked if she could out [sic] for an interview. I said no, I just have too much work to do to sit down and interview people if I'm not hiring. I have no reason to interview for something that may occur in the distant future. One day she called and said give us the courtesy of an interview. I acquiesced to that one evening.

Q. Do you have any idea what period of time that was?

A. It would have to have been between July 21 and the time I interviewed them, so my best recollection would be from July 21 until October 8 or 9.

Q. Do you have any recollection, Mr. Miller, when you first noticed that the two women had applied for jobs?

A. When they called.

Q. That was the first time?

[209] A. Yes, sir.

Q. The application presumably transferred to you, transmitted to you, rather by your receptionist would not have been reviewed for the name of the person who was applying?

A. No, sir.

Q. It would simply have been put in the file without your having looked at the application.

A. Exactly.

Q. How many conversations with Ms. Gaddis and Ms. Starr did you have, Mr. Miller?

A. In total or between the time of the application and the time of the . . .

Q. Between the time of the application and November, 1972?

A. I would estimate six conversations possibly and one interview. I couldn't pin down six conversations as a correct number, but roughly every couple of months after the interview.

Q. Do you have any idea how many conversations followed the initial attempt to seek employment, initial attempt to get a job?

A. Again, it was the whole time from July of 1971 until November, 1972. I'll estimate about six conversations. I think there were two or three phone calls between the time of the application and the time of the interview, and then Ms. Gaddis would call back periodically after that. That was from Oct-[210] ober, 1971, until November, 1972, when I called her and told her there was an opening available.

Q. Let's go back to the interview. Explain to the Court exactly what happened during the interview after Ms. Gaddis and Ms. Starr arrived at the Warehouse Department.

A. I don't recall it being any different from any other interview, other than the fact that it was with two girls. We hadn't interviewed females before, and the question came up as to why do you want to work in the warehouse. They told me they had worked in the warehouse at General Motors. In fact they had told me that on the telephone. It was just a general, nice, pleasant conversation.

* * *

[212] Q. You indicated that the employment applications are maintained in an inactive and an active file for approximately a six months period.

A. Yes, sir.

Q. What conditions would lead you to make an inactive application active?

A. When a person renewed their interest or continued their interest in seeking employment with Ford Motor Company.

Q. Did Ms. Gaddis and Ms. Starr seek, display an interest in seeking employment after January, 1972?

A. Yes, sir.

Q. By what means?

A. By telephone.

Q. Can you remember exactly when that conversation took place?

A. No, sir, I couldn't pinpoint any conversations at all. I know there were several conversations throughout the one year period from the time of the interview until they were hired.

* * *

[214] Q. Do you remember the dates these persons were employed, Mr. Miller?

A. Yes. James Blanchard was August 5.

COURT: What year?

A. 1971. Harry Rogers was August 9, 1971; Phillip Coe was August 16, 1971; and Paul Parks was August 30, 1971.

MR. HUNTER: Your Honor, I'd like to move the following exhibits into evidence, Plaintiff's Exhibit P-13, P-14, P-15 and P-16. Exhibit P-13 is the personnel information of James Blanchard whose application is dated 8-5-71, I'm sorry, your Honor, I apologize, that's the filing date. The application is dated 5-18-71. He was hired on August 5, 1971.

Exhibit P-14 is the personnel information of one Mr. Phillip Coe whose application is dated June 7, 1971, if I'm not mistaken, and who was hired August 16, 1971.

Mr. Harry Rogers whose application is dated July 13, 1971, and who was hired on August 9, 1971. This is Exhibit P-15.

Mr. Paul Parks, Exhibit P-16, who has no application in the records but was hired on August 30, 1971, who was a transferee from one of the other facilities, who presumably from review of the information made application sometime after July 30, 1971.

* * *

[230] A. Was I aware of underutilization of women in the warehouse in 1972? Is that your question?

Q. Yes.

A. There were none working in the warehouse at that time.

* * *

CROSS EXAMINATION OF FRANK MILLER

[244] Q. Mr. Miller, as I understand your testimony on direct, you were responsible for hiring for the warehouse. Is that correct?

A. Yes, sir.

Q. And you, in trying to follow the procedures, as I understood your testimony, have interviewed people only when you were hiring, as a rule. Is that correct?

A. That's correct.

Q. And I believe you testified on direct that applications were filed at the front, subsequently sent to you where they were filed in your drawer, and you reviewed the applications when openings occurred by going to the oldest applications first, within a six months period, coming forward, and reviewing [245] those applications you determined who was qualified, called them in for interviews, and then you hired them.

A. I only reviewed the applications up to the point where I had sufficient qualified people.

Q. Does that mean to say that when you had a six months backlog of applications, you didn't review everyone of those applications before you called in two people for one opening or one person?

A. That's absolutely correct.

Q. What did you do in fact?

A. I reviewed the applications, and when I had a sufficient number of people who appeared to have qualifications, I would call them in for interviews. If the people I called in were, if I decided to hire them or offer them employment, I didn't go to any more applications.

Q. Specifically, Mr. Miller, in the case of Mr. Rogers, Mr. Coe and Mr. Blanchard, did you apply that system?

A. Absolutely.

Q. And did you pull out their applications from the lower part of your pile, I take it, as the earlier applications, and did you determine them to be basically qualified, and then determine whether they were in fact qualified with a subsequent interview?

A. Yes, sir, I did.

Q. Did you specifically, when you hired those three, com-
[246] pare those applications with the applications of one Ms. Gaddis and one Ms. Starr?

A. I would not have had occasion to. No, I did not.

Q. When they were determined to be the people you would hire, they weren't in fact compared with Ms. Gaddis and Ms. Starr?

A. No, sir.

Q. It's true, nevertheless, isn't it, that those applications of Mr. Blanchard, Mr. Coe and Mr. Rogers preceded the applications of Ms. Gaddis and Ms. Starr date-wise?

A. That is correct.

Q. I believe you testified on direct that comparing the experience of those three men, one had 22 months of similar experience, one had 11 months of GM experience, and one was an experienced Ford Parts man from a Ford dealer. Is that correct?

A. That's correct.

Q. I believe I recall your telling Mr. Hunter that the experience related on Ms. Gaddis' and Ms. Starr's applications was

something like 10 months on the outside, which you understood to be interrupted by some layoffs in between, so something less than 10 months experience in their case.

A. That is correct.

Q. In truth, as I understand it, you did not make any judgment of those three versus those two.

A. I did not compare the three with the two.

* * *

[248] Q. As I understood your testimony on direct, the things you look for were experience, industrial experience, reading and writing ability, legal age and you mentioned something about demeanor. Is that what you have the interview for basically?

A. In the course of the interview, you get your feelings toward the people.

Q. Did you hear Mr. Ely's testimony earlier in the day?

A. Yes, sir.

Q. Would you agree with Mr. Ely that the reason for that is because of the compatibility factor in your warehouse, the people working together? Is that the reason for the demeanor?

A. It's relatively a small area that they're working in and you have to continue good relations.

* * *

[249] Q. As I understood your testimony on direct, you hired or received applications dated July 21, 1971, from Ms. Gaddis and Ms. Starr. Did you recall whether or not in fact you had hired or made arrangements for starting dates to begin of any of the three men that Mr. Hunter asked you about, Mr. Coe, Mr. Rogers and Mr. Blanchard?

A. I believe I had already hired prior to July 21.

Q. Why do you say that?

A. Mr. Blanchard was working for a local dealer. I had interviewed him sometime after his application was filed in May. I had interviewed him sometime between May and early July and told him when I had an opening, I would bring him on. When I recognized at what date I would need help, I called him and notified him, and he worked out his notice at Young Ford.

Q. Was that also true with Mr. Coe?

A. Yes, sir. The same thing was true with Mr. Coe. He was working at the time and asked if he could work out his notice.

Q. Was that also true with Mr. Rogers? Was he employed at any time before he actually began work?

[250] A. I don't believe he was then working. I believe that I had interviewed him. I had interviewed him and subsequent to the interview, I called to give him a starting date, so it was possibly two to three weeks prior to the date that he started working before I . . .

* * *

[253] Q. Do you recall several telephone conversations with them prior to the first interview?

A. Yes, sir.

Q. Do you recall several thereafter?

A. Thereafter.

* * *

DIRECT EXAMINATION OF JUDY GADDIS

* * *

[270] Q. In what capacity did you serve at General Motors?

A. I was a parts picker and sometimes a packer.

Q. How long did you work there?

A. From August of 1970, until or through June of 1971.

Q. Was that a full period of employment or were there layoffs?

A. No, sir, the strike was that year in September or October. Then later on in the next year, we were laid off for several months. I don't know exactly how long.

Q. After General Motors, was there other employment?

A. Not until I went to work in 1972 with Ford.

* * *

[275] Q. Can you explain to the Court exactly what happened when you first applied at the facility?

A. Yes, sir. It was in July of 1971, just a week or so after I had been laid off from General Motors, and Ms. Starr and I went together and we went into Ford and approached the receptionist or the switchboard operator and told her we'd like to apply for a job, and she asked us what area we were applying, and we told her the warehouse. She said we don't hire women for the warehouse, and we proceeded to explain to her that we had experience in that type of work because we had worked for General Motors. She looked a little bewildered, and she called someone on the phone and, after talking with someone on the phone, she gave us an application, which we filled out.

Q. Were you interviewed on that date?

A. No, sir.

Q. Did you hear from Ford Motor Company after that?

A. No, sir. A week later, we learned from one of the men that we had worked with at General Motors that Harry Rogers had been hired, and Harry had been laid off along with us in June.

* * *

[276] A. Yes, sir, that is when I called Mr. Miller and I do remember that I called him and asked if he would please just meet us and talk with us. We felt that if he would see that we were sincerely interested in working and we could give him [277] our backgrounds that he would consider hiring us. He agreed that he would meet us and he gave us a time to come in which was, I don't remember how much time. There was a few days or a week, and we did go see Mr. Miller. He was very pleasant at first, and he was very much interested in why we, as women, wanted to work in a warehouse. We explained to him that we enjoyed that type of work, that we had gotten accustomed to that type of pay and that we were very much interested in working there. He let us know before we left, before that conversation was finished that if we had any idea of pushing our way in there, he would fight it all the way.

Q. Did you have other contact with Mr. Miller after that?

A. Yes, sir. About three weeks later, this would have been up into the first week of September, I called Mr. Miller. I thought I'd just not say or do anything for a while. I waited three weeks and then I called Mr. Miller and asked him if he was hiring, and he said, no, he wasn't hiring. I asked him if he would consider hiring women, meaning Ms. Starr and me, when he did hire someone, and he said that he had other applications on file, that he had interviewed other people, and that he wouldn't commit himself on whether or not he would agree to hire women. He became very upset and very angry

with me. I told him, I said I wouldn't want to push my way in there. He said, no, the pressure would be so great that it would be unbearable. I [278] just discontinued our conversation and, as I say, this was in September of 1971, and I know that if I would say that, as Mr. Miller testified, that I continued to call him on up through 1972, it would sound a little better for me, but I did not speak with Mr. Miller or see Mr. Miller after 1971, in September, until 1972 when we were hired by Ford.

Q. When did Mr. Miller interview you? Do you remember?

A. It was around the first or second week of August of 1971.

* * *

[280] Q. Ms. Gaddis, I think it's your testimony that subsequent to December, 1972, that you had no contact with anyone from Ford Motor Company until what date?

A. Well, that would have been sometime the first of November when I was called to ask if I would like to come to work for six weeks, a temporary job.

Q. You misunderstood, after 1972 now.

A. I'm sorry.

Q. After the period of employment you had with Ford, I think you indicated in your testimony that you had no further contact with anyone at Ford Motor Company until some kind of contact in July of 1972?

A. 1973, yes, sir.

Q. In other words, you made no attempt to call Ford or Mr. Miller and to update your previous request for a job, previous application for a job?

A. No, sir, because just a week or so after we were laid off from the six weeks temporary job, General Motors recalled us

to come back to work. I worked for General Motors from January 4, 1974, through January, 1973, I'm sorry, through January 25, 1974.

COURT: Worked from January, early January, 1973, to Jan-[281] uary, 1974?

A. Yes, sir.

Q. What type job did you perform when you went back to General Motors?

A. I was a parts picker.

Q. Doing the same work you had done back in, from August of 1970 to June of 1971?

A. Yes, sir.

Q. You indicated that it was July when you received contact or a telephone call from Mr. Miller?

A. No, sir, I don't remember exactly what time that was. It wasn't Mr. Miller.

Q. It wasn't Mr. Miller?

A. You're talking about in 1973?

Q. In 1973?

A. No, sir.

Q. You were employed at General Motors at that time.

A. Yes, sir.

Q. And someone from Ford Motor Company called you and what did they state to you?

A. That there was an opening and would I like to come back to work.

Q. Did they explain to you what the opening was?

A. No, sir, so I went over to talk to Ed Massey. Becky and I both went together and talked with Ed and asked him if he [282] was going to hire more than one of us. He said, no, they wanted to hire me. I asked what the job would be, and I was never told what that job would be. I think we went back, maybe a second time, I'm not sure, to try to talk with someone again about the position and what it was and how long it would last, and we never could get any information.

Q. Did Mr. Massey, you say Mr. Massey was the one you talked to. Did he say that the job was being offered to you, or did he discuss simply with you, in the form of an interview, the possibility of hiring you into some job?

A. It was so vague that I couldn't pinpoint anything down. They never did say what type of work it would be, whether it would be picking or whether it would be in sheet metal or whether it would be putting up stock or whether it would be on a day shift or night shift, whether it was a permanent or temporary job. At that time, I had a good seniority with General Motors and I had a secure job, and so on those grounds, I refused it.

* * *

[284] COURT: What I want to find out is, was the offer of whatever the position was made while you were there or by telephone later?

A. The offer was made by telephone, and I was interested enough to go out there and try to find out what I could about the offer.

COURT: When he called, you said a while ago that he told you there was an opening, would you like to apply for it.

A. No, sir, he didn't say would I like to apply for it. I think he said would I like to come back to work.

COURT: Then you went out to talk to him at the plant?

A. Yes, sir.

COURT: Was there a later telephone conversation after you had been to the plant?

A. Yes, sir, that was when I turned the offer down.

* * *

CROSS EXAMINATION OF JUDY GADDIS

* * *

[298] Q. Ms. Gaddis, when you went to Ford Motor Company in July of 1971, you first met with the receptionist at that plant, didn't you? Isn't that what you testified this morning?

A. Yes, sir.

Q. She offered you an application. Isn't that correct?

A. Yes, sir, but I remembered later exactly how that all came about.

Q. Tell me again how all that came about, please ma'am.

A. Well, we went in and we approached the receptionist. We told her we'd like to apply for a job. She asked us what type. We told her for the warehouse. She told us they did not hire women for the warehouse. We explained that we had been [299] working for General Motors as warehousemen, and she called someone on the phone and then she gave us an application.

* * *

[300] Q. As I read that affidavit signed by you, at the bottom of the first page, doesn't it say: The receptionist on the first occasion told us that the company did not have females working [301] in the warehouse. That was in July, 1971. We were allowed to fill out an application. Isn't that what it says?

A. Yes.

Q. So, in your affidavit and in my deposition in 1973 and 1976, respectively, you were allowed to fill out an application or offered an application and had no other discussion, other than to be told there were no women working in the warehouse at the time. Isn't that correct?

A. Would you look further into the deposition and find where I later on corrected that in the deposition?

* * *

[306] Q. Ms. Gaddis, after applying at Ford in July, 1971, I believe you told me in your deposition that you also applied at the Converse Rubber Plant. Isn't that correct?

A. No, sir, I was trying to remember the name of a place that made tennis shoes out in Industrial Park, and I couldn't remember the name, and you suggested it was Converse, and I think I agreed with that, thinking that maybe you knew what was the name of it.

Q. Is that who you applied with?

A. I don't think it's Converse. I'm still not sure. I think it's the B. F. Goodrich Company.

Q. Do you remember any other places that you applied after July, 1971, except Ford?

A. I applied at Genuine Parts. I applied at Westinghouse. I applied at most of the car dealers for stock work. I'm not saying I filled out applications at all these places, but I did seek out these places for employment.

* * *

[315] Q. Ms. Gaddis, this morning I recall your telling the [316] Court on direct that there was something vague about the offer, you didn't know when you'd work or where you'd

work or something. Isn't it true at Ford Motor Company that you apply for work in the warehouse, and there are various functions assigned once you're there in the warehouse, and that you don't get hired for a particular position? Isn't that true, to your knowledge?

A. I think before, when I was hired, I was hired as a picker-packer, and that would be different from working in the bulk area of Ford or the sheet metal area of Ford, and when I worked at General Motors as contasted [sic] to Ford, the low seniority person did the janitor's work, so naturally I wanted to know what particular job I was going to be placed on.

Q. That really didn't matter that much to you, did it?

A. At the time it did because I had a good job.

* * *

[321] Q. Ms. Gaddis, did you talk with Ms. Starr after you were offered a job in July of 1973, before rejecting that job?

A. Well, she and I went out to the Ford plant together to talk with Mr. Massey about the position that was being offered, whatever it was.

Q. Is this before Ms. Starr had been offered that job?

A. Yes, sir.

Q. So, the order of sequence is, you were offered a job, you say you did not reject it and did not tell them you rejected it, you went out and talked with Ms. Starr and Ms. Gaddis [322] and Mr. Massey.

A. The two of us talked with Mr. Massey.

Q. Was it in that conference that you learned that he would not hire but one of you?

A. Yes, sir.

Q. You testified that you would not come under those circumstances and others you testified about.

A. That was one of the circumstances, yes, sir.

Q. When you went out and talked with Mr. Massey, had Ms. Starr yet been offered a job?

A. No, sir, I don't think so.

Q. When you talked to Mr. Massey, did you still have an opportunity to accept a job with Ford?

A. Yes, sir. May I add there that I had a good job at that time?

Q. You were satisfied with that job at the time?

A. Yes, sir. I had seniority and I knew that I wasn't in danger of any layoff, where if I had accepted the job at Ford, I might have worked a week or two weeks and been laid off because I would have been low seniority.

* * *

REDIRECT EXAMINATION OF JUDY GADDIS

* * *

[332] Q. Mr. Vinroot mentioned or asked you questions about Mr. Massey having offered you a job, presumably it was in July, and you indicated . . .

A. I don't remember what month it was.

Q. Mr. Massey, I assume, called you by telephone.

A. The best I can remember, yes, sir.

Q. And you and Ms. Starr went out to the warehouse.

A. Yes, sir.

Q. To talk to Mr. Massey.

A. Yes, sir.

Q. Did you condition any job offer on Mr. Massey hiring both you and Ms. Starr?

A. No, sir, I didn't make that the sole condition, no, sir.

Q. Would you have desired that Ms. Starr would have been hired along with you?

A. I would have been much happier in accepting the job where there was at least one other lady working. I think it would have been a strained atmosphere being the only lady in there.

[333] Q. Did Mr. Massey explain what type job and whether or not the job would be temporary or permanent?

A. No, sir, he did not.

Q. Did you ask him questions about that?

A. Yes, sir, I did.

Q. And he refused to answer those questions?

A. He didn't refuse. He just evaded it.

* * *

[335] COURT: Discontinue the leading questions and ask simple questions.

Q. Ms. Gaddis, would you say . . .

MR. VINROOT: Objection to the form of the question.

COURT: Objection sustained. The objection is to leading questions, Mr. Hunter. Don't ask leading questions.

Q. Ms. Gaddis, which employment, considering Ford and General Motors, would you deem more desirable?

MR. VINROOT: Objection.

COURT: Overruled.

A. Are you saying which place would I have preferred to work?

Q. Yes, would you discuss that please?

A. Well, just to be perfectly honest, I preferred working at General Motors.

Q. Why?

A. Well, because you weren't under a great deal of stress and pressure there.

MR. VINROOT: I withdraw my objection.

Q. Then why did you go to Ford Motor Company to seek employment when you were called about the job?

A. Well, they did pay better, and I just felt that I shouldn't refuse something without investigating and finding out what I was being offered.

Q. Ford Motor Company did pay better than General Motors?

[336] A. Yes, sir.

Q. Then would you say that you had been offered a job as a warehouseman making more money, and you would have accepted that position if all other things had been equal?

A. If I had known what the position would have been.

* * *

RECROSS EXAMINATION OF JUDY GADDIS

* * *

[338] Q. I believe you testified just a moment ago that it was not the sole condition that you rejected the job in 1973 that Ms. Starr also be hired. That was the sole condition of your coming back before but that, as I recall your testimony, it would have been a strained atmosphere without Ms. Starr.

A. I didn't say without Ms. Starr. I said being the only woman in the plant.

Q. Did you think in 1971 when you appled that without women in the warehouse, their hiring one of you might be a strained atmosphere as well?

A. Well, I just really didn't think about it. We had hoped that they would hire both of us.

* * *

DIRECT EXAMINATION OF REBECCA STARR

* * *

[346] Q. You worked at General Motors until approximately what time?

A. June, 1971.

[347] Q. At which time you were what?

A. Picker and packer.

Q. You worked until June, 1970. Were you laid off at that time?

A. June, 1971, yes, sir.

Q. What is your educational background?

A. Well, I finished high school, and presently I'm in college studying to be a registered nurse.

Q. You are a high school graduate?

A. Yes, sir.

Q. Let's take your employment at GM, Ms. Starr. Explain to the Court exactly what duties you performed at GM as a picker. You said a picker not a packer?

A. I did both. I picked and I packed, also.

Q. Explain that briefly to the Court.

A. Well, I had IBM cards, and I would pick up a stack of them, and they would read where to go and what aisles to get what parts, and I pushed a truck, and I would pick up these

parts, and our orders went all the way through. I picked the bulk, sometimes fenders and engines and hoods. I picked the complete order. Then later on, I was put in the packing area, and I packed these parts.

* * *

[349] Q. After Ford Motor Company, what was the next period of employment?

A. January, 1973.

Q. What was that?

A. General Motors.

Q. You were recalled by General Motors?

A. Yes, sir.

Q. You were working as a picker and packer there?

A. I was working as a picker. They used me as a packer, too.

Q. You worked with General Motors until when?

A. From 1973 to January, 1974.

Q. At which time you were laid off again?

A. Yes, sir, when they terminated me. The place moved. General Motors was moving to Atlanta.

Q. Did you have employment after you worked at General Motors?

[350] A. No, sir.

Q. And you are not presently employed?

A. No, sir. The Government is now paying for me to go to school.

* * *

[350] Q. Can you tell the Court exactly what happened on that date at the time you made application?

A. Yes, sir. To the best of my ability, I recall that Ms. Gaddis and I had gone together, and we went to the receptionist and told her we wanted a job. She thought, I guess, I believe she must have thought it was the offices. We told her it was the warehouse. She said they didn't hire women to work in the warehouse, didn't have women working in the warehouse. We told her we were capable of doing the job, we could do it. I recall that she gave us an application, and we filled it out. I remember, I've gone back and reviewed, and I remember her saying that they weren't hiring at that time.

* * *

[352] Q. Were you there alone at that time?

A. No, sir, Judy Gaddis was with me.

Q. Did you hear from Ford after that interview from Mr. Miller?

A. It seems like I talked to him another time and this time that I talked to him, he said that if we camped on his doorsteps, he didn't have to hire us, that he could hire the next person that came in.

* * *

[357] Q. Ms. Starr, you mentioned you had various periods of employment since July 21, 1971. You only mentioned Ford Motor Company. Did you mention one more between July 21, 1971, other than Ford?

A. No, sir, I don't believe so. I don't know when the unemployment office got me that job putting up stock just for a short time. I don't know what period it was. It was in '71, but I don't know what period.

Q. Were you seeking employment during that period of time?

A. Yes, sir.

Q. During the full period of time, you were seeking employment from July 21, 1971, up until the present date, have you been seeking employment?

A. Yes, sir.

* * *

CROSS EXAMINATION OF REBECCA STARR

* * *

[364] MR. HUNTER: Your Honor, I object to this line of questioning about what occurred at General Motors.

COURT: Objection sustained. I sustain objection to the last question.

Q. Did you go back to work at General Motors in January, 1973?

A. Yes, sir.

Q. After you went back to GM in 1973, Ford offered you a job in July of 1973. Is that correct?

A. Well, they said there was an opening.

Q. Did Ford offer you a job in 1973, in July of that year?

A. They said there was work, an opening. I'm not sure about the date.

Q. Did they or did they not offer you a job in July of 1973?

A. I'm going to answer as honestly as I can. I don't remember exactly what they said. All I can recall is that there was an

opening. They may have said job, but I can't recall now this very minute.

Q. When you were called in July, 1973, did you tell them that you already had a job with General Motors and, therefore, did not want the job at Ford?

A. No, sir.

[365] Q. That is not what you said?

A. Let's see. We had gone, I had called to talk to somebody, I forgot who it was, over the supervisor, whoever was over Ford, to talk to them about the job opening, and they said they couldn't talk to me. They were going to be out of town. I remember Ms. Gaddis and I went over during the lunch breakto talk to Ed Massey. I remember quite plainly that when we were talking to Ed Massey, this man that had told me that he was going to be out of town, somebody told me who he was and I seen him walking through the plant. I remember Ed Massey wasn't specific on the job about what it would be. I did have, at General Motors I had fifteen, I don't know if it was fourteen or fifteen people under me. I had seniority, and I also, this is the truth about I was scared. Whenever I had worked at Ford before, I had been badgered and I don't know, I was just, I wanted to look into the job. Yet, I had a fear to go back. I didn't know what I would be facing.

* * *

[367] Q. No, that's all right. When you first went to apply at Ford, did the receptionist give you the application?

A. Not at first. She's the one that gave me the application.

Q. Do you remember what she said to you at time you asked for the application? I believe on direct you testified that she said that women weren't hired for the warehouse.

A. What page are you on?

Q. I'm not on any page.

A. I seen you looking.

Q. I asked if the receptionist said to you that women were not hired for the warehouse.

A. I believe that is what she said, yes. They did hire women for the office work, but they didn't for the warehouse.

Q. I refer you to Page 15 and 16 of your deposition. In response to my question at that time on Line 15 as to what the receptionist said, you said that you did not want to state [368] for a fact what she said. Then on Page 16, Line 12, I asked what happened after the receptionist told you that they didn't accept applications from females to work in the warehouse. You answered, I believe that this is what she stated, but I'm not sure. I am really not. Do you remember what she said, as you just stated?

A. Yes.

Q. Or do you not remember what she said at all, as you stated to me in your deposition?

A. I sat down and thought about this and I know, when I first went over there for the deposition, I hadn't even sat down and thought about the case. It had been six years ago, but since then I have thought about it, and I know what she said.

* * *

DIRECT EXAMINATION OF ZETTIE ANN SMITH

* * *

[390] Q. I'll hand you, Ms. Smith, what has been marked as Plaintiff's Exhibit P-30 and ask you if you recognize this as your application that you filed with Ford Motor Company?

A. Yes, Sir.

COURT: What is your present age?

A. Fourty-one.

Q. That is your application, Ms. Smith?

A. Yes, sir.

Q. Do you remember having filed that?

A. I think so.

Q. Have you filed other applications at Ford Motor Company?

A. In 1971, I was out in April and filed an application, and in 1971 in June, I was out and filled out an application, [391] I believe.

Q. Do you remember what happened?

A. In 1972, I was out one time and filled out an application and this, I believe, was my last application out there.

Q. So, was that four applications in all that you have given?

A. I think so.

Q. 1971.

A. And 1972 and 1973.

Q. That's three applications.

A. That is three applications and I believe I was out in 1974 and filled out an application, because this was just right after I had gone to Terrell Machine, and I thought that I would not be satisfied with the job there.

Q. Do you remember what happened, Ms. Smith, when you went out to fill out an application the first time? Did you ever hear from the Ford Motor Company regarding that application?

A. Well, they would always say, we'll let you hear from us, or something like that. I never heard from them, and that is the reason for returning.

Q. When you went out to Ford Motor Company, Ms. Smith, who did you speak to?

A. The first time, a lady, I believe.

Q. Did you ask her for an application?

[392] A. Yes.

Q. What did you say when you went out to apply for a job?

A. Well, I just went out and I asked the lady, I told her my reasons for being there and if I may fill out an application. I think she handed me an application blank, and I filled out an application.

Q. Is that substantially the same thing that happened every time you went out there?

A. There was one time that I was asked what department I worked in at Hudson Hosiery. I told them, and she asked me what was that pertaining to. I told her orders. She said we will let you hear from us.

* * *

[393] Q. But at the time you filed these applications, Ms. Smith, you were desirous of a job at Ford. Is that correct?

A. I needed a job at that particular time. This is when Chadbourne bought Hudson Hosiery, and they told us they were going out of business. That was my reason for looking for a job.

* * *

CROSS EXAMINATION OF ZETTIE ANN SMITH

* * *

[394] Q. Let me ask you, please, ma'am, did you go and apply at Ford several times during the time you were at Hudson Hosiery?

A. Yes, I did.

Q. And did you say that the reason for that is that Hudson Hosiery was closed down?

A. Yes.

Q. When did Hudson annouce that they were going to close down? How long in advance of actually closing down did they make the announcement?

A. In 1971, they had a meeting with the employees in February, and Hudson announced that Chadbourne was buying the company, and they did not know exactly what would happen but, [395] at the present, they said you employees can do whatever you think. I thought that as soon as the weather break, I would look for a job. In April is when I started looking for a job.

Q. Did you fill out an application at Ford?

A. I certainly did.

Q. Did you come back in June, as I believe you testified?

A. I certainly did, on vacation.

Q. Did you hand that application back to the receptionist at Ford Motor Company?

A. I certainly did.

* * *

[396] Q. Did the receptionist at Ford Motor Company give you an application when you walked in and asked to apply?

A. Did she give me an application?

Q. Yes, ma'am.

A. Yes, sir, she did.

Q. Did she receive that application back from you?

A. Yes, she did.

Q. And I assume because you came out several times that no one ever discouraged you from filing an application. Isn't that so?

A. I was never discouraged from filing an application.

Q. Did you indicate in, on each occasion that you were applying for work in the Ford warehouse or what did you tell them?

[397] A. I didn't indicate what job I applied for. I just, unless it was something in my line of work or whatever.

Q. Your line of work was what?

A. Stockroom or shipping or something like that.

* * *

DIRECT EXAMINATION OF PHILLIP COE

* * *

[401] Q. Since you were in school during that time, do you [402] have any idea how long after you graduated from high school that you applied? Would it have been that date or would it have been later?

A. Just like I was thinking, you know, I was thinking about the case, trying to remember how long, you know, before I went to work. I was thinking it was only just two or three weeks before I went to work.

Q. That you filed the application, right?

A. Right. This is my handwriting here.

Q. Mr. Coe, you went to work at Ford Motor Company as a picker and a packer on August 16, 1971.

A. Yes, sir.

Q. And how long prior to that time were you called to come to work before August 16, 1971?

A. From one to two weeks.

Q. That would have been about August 2.

* * *

DIRECT EXAMINATION OF JAMES BLANCHARD

* * *

[411] Q. Do you remember, Mr. Blanchard, exactly how long after you filed your application you were called by someone, and by whom were you called?

A. I was notified by Frank Miller. I don't remember as [412] far as how long before, you know, a week or two weeks.

Q. Could it have been longer?

A. No, I don't think it was longer than that.

Q. What was the nature of the call? Did he ask you to come for an interview?

A. I had my interview when I put in my application.

Q. Did he tell you there was a job available that day?

A. No.

Q. Did you request an interview with him?

A. No, just went up and put in my application.

Q. He just gave you an interview?

A. Uh huh.

* * *

DIRECT EXAMINATION OF ROBERT SIMPSON

* * *

[425] Q. And the question, Mr. Simpson, is, do you, would you also look at the second page of that document I handed to you? Can you tell from the document the exact date you were hired by Ford Motor Company?

A. This would be August 27, 1973.

Q. Prior to August 27, 1973, Mr. Simpson, what contact did you have with Ford Motor Company?

A. Prior to this date, none that I can recall. I was asked for an interview, I guess, sometime in that August month. I was hired two weeks later.

Q. So, you were called about two two [sic] weeks before you were actually employed and told to come to work?

[426] A. Yes, sir.

* * *

DIRECT EXAMINATION OF ED MASSEY

* * *

[430] Q. Were you there and employed in the warehouse in July of 1973 when Ms. Gaddis and Ms. Starr were communicated with by Ford Motor Company?

A. Yes, sir.

Q. Did you participate in those communications?

A. Yes, sir, I did.

Q. Tell me, if you will, about the communications and how you contacted and what transpired at that time?

A. On July 26, 1973, I sent a wire to Ms. Gaddis advising her to report to work on July 30, 1973.

Q. That was on July 30th that you sent a wire?

A. The wire was sent on July 26th.

Q. That was to Ms. Gaddis?

A. Yes, sir.

Q. What did the wire say?

A. I don't recall exactly but, to the best of my knowledge, to report to work at 9:30 at the depot.

Q. What date?

A. July 30th.

Q. In what position?

A. I don't know if we specified a position. If we did, it would have been a warehouseman.

[431] Q. Did you subsequently have a response to that wire?

A. She called me on the 27th.

Q. Of what month?

A. The 27th of July.

Q. She called and talked to you personally?

A. Yes, sir, she did.

Q. What did she tell you?

A. She called approximately 10 AM and asked why she was being called in, and I told her . . .

Q. Mr. Massey, you'll have to talk slower. The Court Reporter can barely keep up with me and I'm talking slowly. Tell the Court Reporter and the Court slowly what she said and what you said.

A. She asked why she was being called in. I told her it was due to present quits and possible future retirements. She asked how many people were going to be hired and if Becky Starr would be one of them. I said that management had decided to fill two openings. I did not know if Ms. Starr would be called. She said at this time that she did not like to work where there were no other women. She asked what she would be doing and if 9:30 to 6 would be the regular hours. I told her to call back later after I had a chance to ask Mr. Ely these questions. She also said I wonder why Ford is doing me this favor since we have this suit against them.

Q. Did you make notes of that conversation contemporan-
[432] eously with the call?

A. Yes, sir, I did.

Q. Is that what you're referring to?

A. Yes, sir.

Q. Did you subsequently talk with her by telephone again?

A. Yes, sir. She called me later that afternoon.

Q. What did she say and what did you say at that time?

A. She asked me what I had found out. I told her management was not sure what her regular duties would be, that 9:30 to 6 would not be her normal hours after she was assigned to her normal duties. Also, we would have to fill this opening by July 30, 1973, or we would have to contact our next prospect. She said she appreciated the offer but, because she would be the only woman in the plant, she thought it best to refuse at this time. I told Ms. Gaddis that according to the wire, she had until 9:30 of July 30, 1973, to report for work and we would not contact anyone else until then.

Q. Did she ask any questions about what work was to be done?

A. Not in the second phone conversation. That was asked in the first, the morning call that I had from her.

Q. What did you tell her, if anything, about what work she would be doing or what category she would be working in? Do you recall?

[433] A. In the second conversation, I told her it was not known exactly what her duties would be.

Q. Do you recall having a discussion as to whether she would be working in the warehouse or not?

A. Yes, she would have been working as a warehouseman.

Q. Was there any contention at that point about what she would be doing or . . .

A. No further questioning about the type of work from her.

Q. Why did she turn the job down, according to your information from her?

A. Primarily because or solely because, as far as I know, there would be no other women employed in the warehouse.

Q. Did you then have some correspondence with Ms. Starr, Rebecca Starr?

A. Yes, sir. We notified Ms. Starr, I can't remember exactly how, but I would assume by wire.

Q. Why would you assume?

A. This is what we normally would recall or call an employee back to work. We have done this with all other employees.

Q. Why is it normal or why did you say you sent a wire?

A. When an employee has previously worked for us and is on layoff or not presently working, it's been a custom to send a wire to the employee telling them the date and time to return to work.

[434] Q. And that is the procedure you always used while you were there in the warehouse?

A. Yes, sir.

Q. Did you use that on these occasions, so far as you recall?

A. Yes, sir.

Q. Did you use it with one David Martin on this occasion, so far as you recall?

A. As far as I can recall.

Q. Go ahead, you said something about a wire or communication to Ms. Starr later on.

A. Yes, sir. That would have been the 31st after Ms. Gaddis had not reported to work.

Q. July 31, 1973.

A. Yes, sir.

Q. Did she respond to that communication?

A. Yes, sir, she called me on the 31st of July.

Q. What did she say?

A. She said Judy Gaddis and herself wanted to come and talk to Mr. Ely together. I told her Mr. Kaim and Mr. Ely were in negotiations with the union, and I did not know when they would be through. She asked if I thought there was any possibility of them both being hired.

COURT: Is this Ms. Starr?

A. This is Ms. Starr. She expressed the same opinion as [435] Ms. Gaddis. She didn't want to be the only woman in the plant. I told her it looked doubtful as there were only two openings and David Martin had filled one. She said she would call back later to see if the meeting was over.

Q. Were Mr. Kaim and Mr. Ely in fact in negotiations with the union?

A. Yes, sir.

Q. Where?

A. In the plant.

Q. Were they in fact unavailable at that time?

A. Yes, sir.

Q. Were they subsequently out of those meetings before the day was over?

A. Yes, sir.

Q. Did you in fact have any further communications that day with Ms. Gaddis or Ms. Starr, who I believe you testified you were talking to?

A. No, sir.

Q. Did you have any subsequent conversation with Ms. Gaddis or Ms. Starr?

A. Yes, sir.

Q. When and what?

A. On August 1st, I received a telephone call from Ms. Starr.

Q. Did you on the 31st of July, 1973, make notes contem-
[436] poraneously with your conversation with Ms. Starr?

A. Yes, sir.

Q. Do you have those notes and are you recalling from those notes?

A. Yes, sir.

Q. Who said what? All right, did you subsequently have a conversation with anybody else after July 31st?

A. On August 1st, Ms. Starr.

Q. What did she say then?

A. I received a call from her. She said, she asked, excuse me, if Ken Ely was testing her.

Q. Testing her?

A. Yes, sir. She said they had found out that Harry Rogers was quiting [sic], and she thought there would be three openings instead of two. I told her I didn't think management was testing her and that there were only two openings at the present

time. I told her that when it was decided to hire two people, management probably took Harry Roger's quit into consideration.

Q. Do you know whether in fact management hired one or two people in July, 1973?

A. I believe they hired two people.

Q. Who were they?

A. Harry Rogers is the only one that I can think of.

Q. They hired Mr. Rogers in . . .

A. I'm sorry, David Martin.

[437] Q. Do you know whether they hired anybody else at that point or did Mr. Rogers stay on the job or what?

A. No, sir, I don't.

Q. Did Ms. Starr ask any questions about the kind of work she would be doing at all?

A. No, sir.

Q. Did she ever mention to you any question about what kind of work she would be doing as some sort of condition of her coming or not coming?

A. No, sir.

Q. In fact, what was the only reason Ms. Starr told you she would not come to work, if she told you that at all?

A. Because there were no women in the plant.

Q. Did you make a note to that effect?

A. Yes, sir.

[455] Q. Do other people work out there at the receptionist's desk?

A. Yes, they do. Actually, I'm the depot manager's secretary. I relieve. I also relieved on the Teletype. LaRue Allen happened to have been the switchboard operator. I was relieving, either relieving on break or at lunch or vacation. I don't remember whether she, where she was when I was relieving.

Q. Were you one of the receptionists in 1971 and 1972 and 1973?

A. Yes, sir.

Q. Did you, when Ms. Gaddis and Ms. Starr applied, consider that somewhat unusual?

A. Most unusual.

Q. Did you discuss it with the other receptionists?

A. Yes, sir.

* * *

[457] Q. Do you recall in April and June of 1971, an application by a female, I would guess in her 40's, I believe, a black female, for work in the Ford warehouse?

A. No, sir.

Q. Do you recall any female applications between July, 1971, and November of 1972, after Ms. Gaddis and Ms. Starr applied as you previously testified?

A. Specifying a job in the warehouse you mean?

Q. Yes, ma'am.

A. No, I do not.

Q. Do you remember some applications by females in November of 1972, and thereafter for work in your warehouse?

A. Not specifying such. Some girls would come in and say, do you hire girls in the warehouse, or maybe even prior to that, if anyone came in, girls, women, they would say, do you hire ladies in the warehouse. My only reply is, we don't have [458] any at the present.

Q. What would they do?

A. I would say, you're welcome to make an application.

Q. What would they do when you told them that?

A. Some did, some didn't.

* * *

DIRECT EXAMINATION OF FRANK MILLER

* * *

[471] Q. I believe you also testified that you interviewed some women named Gaddis and Starr in 1971. Is that correct?

A. That is correct, sir.

Q. When did you first become aware that Ms. Gaddis and Ms. Starr had applied to work in the warehouse?

A. When Ms. Gaddis called me on the telephone.

Q. When would that have been with relation to when you hired Mr. Rogers and Mr. Coe and Mr. Blanchard?

A. It would have been after I hired those gentlemen.

Q. So, she called you sometime, you think, in what month of 1971?

A. About the middle of August, 1971.

Q. Tell me, if you will, about that conversation.

A. Ms. Gaddis called on the telephone and said that they had made application with the company, asked if I would interview her.

Q. What did you tell her?

A. My response was that I'm not hiring, and I don't anticipate doing any more hiring in the foreseeable future. I have an extremely heavy workload. I don't need to interview. I couldn't spare time out of the day to do so.

Q. What did she say?

[472] A. She seemed to be satisfied with the answer, and said I'll get back with you.

Q. Did she call you back later?

A. She called back later in August or September.

Q. What did she say at that time?

A. It was very much a repeat of the same conversation, will you interview us, do you have any job openings, do you expect to have any. My responses were very much the same. I don't have any. I don't anticipate doing any hiring. I can't spare time out of the day.

Q. Did you have subsequent conversations with her?

A. There was another telephone conversation at which time Ms. Gaddis called and said, please, just interview us, give us the opportunity to meet, go sit down and give us an interview.

Q. Tell me, if you will, what you said on that occasion.

A. At the end of the conversation, I said, okay, I'll sit down and interview you. I have no prospects for employment but, if it will satisfy you, make you happy, you are the first women who have ever applied here, I'll come up, sit down and interview you. We set a date and time of 5 o'clock in the evening because that was the end of the normal picking shift.

Q. Did you meet with them on that occasion?

A. Yes, I did.

Q. Do you remember what time of day it was?

[473] A. Yes, within a matter of minutes, I would say it was 5:10 PM. I recall the end of the picking shift was at 5 o'clock. I went to my office, picked up the applications, read them as I walked through the warehouse, stopped and asked the picking foreman how things had gone. I arrived in the lobby. Recognizing I was late, I had told them 5 o'clock, I apologized for being late, having made them wait, even though it was a short period of time.

Q. Did you talk with them at that time?

A. Yes, sir. We sat in the lobby. Specifically where we sat, there was a two-piece settee with the back to the front lobby window. I sat on the left side of the settee. Ms. Starr sat on the right side of the settee, and Ms. Gaddis sat on a single chair against the wall facing us.

Q. Tell me about the conversation.

A. It was a very amicable conversation. As I would always do in an interview, I opened the conversation with something which could serve as an ice breaker. Having four daughters and a wife, I, reading through the applications, they had worked for Fashion Two-Twenty, and the fact that I had a wife and daughters, it was something to open the conversation, to relieve any tension, whatever the case may be. As I recall my school, the proper way to open an interview is to try to get the person to relax.

Q. What did you say and what did they say?

[474] A. We discussed Fashion Two-Twenty and so forth, and then I asked them why they came to Ford Motor Company to apply for a job. I was rather astounded that two nice looking,

well-dressed young ladies would apply for a warehouse job. They told me that they had worked at General Motors. They had children. General Motors and Ford were the only places that paid enough money so that they could make sufficient money to pay a baby sitter and have some left over, as opposed to the other wages in the Charlotte area.

Q. How did you respond to that?

A. My response to that was fine. I agree that there is no sense working if you can't make sufficient money to make it worthwhile. In the course of the conversation, I further went on to explain to them that we didn't have any women working in the warehouse. With no women working in the warehouse, they would be, if the opportunity presented itself to hire the two of them, which is what they requested, that the two of them be hired together, that if the opportunity presented itself to hire them, they would be very much in the same circumstances as Jackie Robinson was when he broke the color barrier in baseball. You are going into brand new ground where there are not now nor, to the best of my knowledge, have there ever been women working in the warehouse. It's an industrial atmosphere. There are lift trucks running, conveyors. You're going into an area where men use rough language, and a very distinct possibility where there [475] are men and two attractive young ladies working in there, they may very well have been subjected to passes, offensive remarks, off-color language, what we call shop talk. They should prepare themselves for it.

Q. How did they respond?

A. They very well acknowledged that was a distinct possibility. They were willing to accept that risk, having worked at General Motors previously.

* * *

UNITED STATES DISTRICT COURT

TESTIMONY FROM PROCEEDINGS BEFORE THE SPECIAL MASTER

DIRECT EXAMINATION OF KEN ELY

* * *

[238] Q. Have you in each instance that you hired someone to work there had any rules that you applied in terms of the requirements that you applied to people that you offered jobs to, and if so, what were those requirements?

A. To your first question, yes; we have rules that we follow, and those were ones I followed in '73 when I first took over, and they consisted mainly looking at the applicant to determine whether he had warehouse-type experience, something equal to the work that we do in our warehouse. We also, we have what is called inactive and active files as far as applications are concerned meaning that we maintained an active file of applications that are not more than six months old. From this file, we review and then we determine which candidates we will select for subsequent openings.

Q. When you decide to hire someone for an opening, what procedure do you follow?

A. The procedure I would follow would be to go back through the applications that are not more than six months old. We would then work backwards, we would then determine what the individual had, what type of experience, pull out those applications that had experience like the work that is done in our distribution center.

* * *

[239] Q. I believe you just testified that you considered applications that were six months old. Did you consider applications that were more than six months old?

A. Only in such instances where they were updated via phone call or by somebody coming in and saying a gentleman or lady is still interested or a note given to us in writing via the mail.

Q. Did you when you offered jobs to Mrs. Gaddis and Mrs. Starr require them to come in and file new applications?

A. No.

Q. Did you, in fact, know that they had continued interest in the Ford Motor Company through other people that had indicated that to you?

A. Yes.

* * *

[241] Q. Did you decide on the basis of your consideration of Mr. Simpson's application to interview him?

A. Yes.

Q. When did you make that decision?

A. I made that decision the early part of August.

Q. Of what year?

A. Of 1973.

Q. Shortly after you came to Charlotte?

A. Yes, sir.

Q. Did you do so by comparing his application with others?

A. That would be the process I would be forced to go through.

Q. Is that the way you make decisions to have interviews?

A. Yes.

Q. Did you do so in this instance?

A. Yes, I did.

* * *

CROSS EXAMINATION OF KEN ELY

* * *

[264] Q. At the time you hired Mr. Simpson in August of '73, how many employees were there in the warehouse?

A. I really couldn't tell you. My guess would be fifty-four or fifty-five. I would have to dig out an old seniority list to respond to that intelligently.

Q. How many women were there in the warehouse department?

A. None.

* * *

REDIRECT EXAMINATION OF KEN ELY

[267] Q. Did I understand your testimony on direct to be that you have a six-month rule because of a practical reason or is there any other reason for that rule?

A. Really, it is very practical. To more or less repeat what I said earlier, we have a lot of applications on file. We consider those people that still might be available for employment or have employment to Ford Motor Company. Where was my mind? Well, we consider these people that still might want a job with our company.

Q. How many applications do you get a month out there?

A. I don't know. It's either thirty or forty.

Q. Over a six-month period, could you accumulate one hundred and eighty or two hundred?

A. I would say so, yes.

Q. How big a stack, will you show me with your hand, how big a stack do you have every six months when you go back and look through them?

A. It would have to be a stack to show you by hand about like this.

Q. Several inches high?

[268] A. Yes, which is quite a bit of applications.

Q. Over a year's time or two year's time, do you accumulate boxes of applications?

A. Yes.

Q. What do you do when you select one? Do you put the cards out on the table and sort of look between this one and that one and put aside those that you consider to be inexperienced or for some other reason be objectionable, such as fired?

A. Yes.

Q. Then take those that are, in fact, within your standards and then select the ones that you think should be interviewed and call them in, is that the way your procedure goes?

A. Yes, sir.

Q. There have been a lot of questions about whether, in fact, you did review certain applications before you hired Mr. Simpson or whether you went and hired Mr. Simpson. My question to you is to the best of your recollection, did you, in fact, use your six-month rule to consider all of the applications within six months when you employed Mr. Simpson?

A. I would have to answer that this way. I have the responsibility to the company, and I have the responsibility as I know of the EEOC case filed against us, and I know all of these responsibilities and they are very well implanted in my mind. I would go through the applications I would be forced to go through and follow the criteria that I have utilized in the past, and to the best of my ability, get the individual which is

considered the most capable, with the most experience [269] based on these criteria so I would have to automatically go through all of these using these criteria.

* * *

[272] Q. Let me ask you to look at that application, which bears the date of May 16, 1973. I ask you whether you would have considered that application with regard to Robert Simpson's hire?

A. From a date standpoint, I would have considered. From an occupational background standpoint, I would not.

* * *

RE-DIRECT EXAMINATION OF CAROLYN HAYES

[294] Q. The funds that these ladies were receiving from the Manpower Training Program under Title 1 SEDA [sic], am I correct that they were being paid from Federal funds supplied by the taxpayers at large?

A. Correct.

Q. That all you were doing, or whoever was administrating the program, would see that they got the funds and check on the number of hours they were actually participating in the training program?

A. Correct.

THE COURT: Let me ask you this. Do I take it that you actually were the person in your SEDA [sic] with whom Mrs. Gadis [sic] and Mrs. Starr personally contacted?

A. Right.

Q. Can you tell me whether or not their involvement in SEDA [sic] program was initiated by your agency or some other outside force or whether it was initiated by their making an application?

A. I think it was initiated by our agency, meaning when they were filing for unemployment insurance benefits and talking with the unemployment insurance interviewer, then the job opportunities or training opportunities were brought up at that time, and they were then referred to me by the members of our agency.

CROSS EXAMINATION OF JUDY GADDIS

* * *

[357] Q. You were, I believe, laid off at General Motors in June, 1971.

A. Yes, sir.

Q. What did you do to seek employment between that time and the time that you were, I believe, employed by Ford Motor Company in November of 1972?

A. I made weekly visits to the employment office, kept in contact with them converning [sic] what jobs might be available. I applied at various places in Rock Hill, where I was living at that time, and anything else I could do. I also worked part-time, as I testified earlier.

Q. Where did you apply in Rock Hill?

A. Well, if you remember, I testified earlier that I had only lived there for a short time and that's been quite a few years ago. The only place that stands out in my mind is Celanese. But, as I told you earlier, it's a matter of record at the employment office since I had to list in writing each week the places I contacted during that time.

* * *

[364] Q. As I recall, you were employed at Ford during December of 1972 and then you began working in early 1973 with General Motors.

A. Yes, sir.

Q. During the time you were working with General Motors were you fully employed, was that a full-time job?

A. Yes, sir.

* * *

[369] Q. Now, you were, I believe, terminated from General Motors in 1973, sometime in January or . . . . excuse me, 1974, sometime in January or February, is that correct?

A. Yes, sir.

Q. Tell me, if you will, about your efforts to seek employment from that time forward, that is, where you looked for employment and who you went to apply for work with.

A. I immediately went to the employment office here in Charlotte and made efforts through them to obtain a job. I applied at Eastern, Delta, Piedmont, all the reservation centers up town; Harris-Teeter warehouse. There is a tractor parts place that's behind General Motors that I applied at, and there are some other businesses back there, which names I don't recall. Again, Genuine Parts here in Charlotte, Genuine Parts in Gastonia; different parts warehouses, independent parts dealers, all the car dealers again, and this type of thing, and these were repetitious, not a one time thing. I went back to most places more than several times.

Q. Did you ever get offered any jobs during that period?

A. No, sir, not one time.

Q. At a hosiery mill?

A. No, sir.

[370] Q. From January of 1973 through September of 1974 you had no job offers?

A. You mean January of '74?

Q. Excuse me, yes. Through September of '74 you had no opportunities?

A. No, sir.

Q. No job offers from any of the textile mills during that period?

A. No, sir.

Q. Were you given any reason for their failure to give you a job offer?

A. Most people would say we can't hardly keep the ones we have. This is when the economy was so low, when the layoffs, or the bottom had fallen out of the job market, if you recall.

Q. Did you simply go to places you thought you wanted to work or did you go to places where you thought you might get a job?

A. I went to places where I thought they might hire me because of my experience with General Motors and Ford.

* * *

CROSS EXAMINATION OF REBECCA STARR

* * *

[397] Q. Between January of 1974 and September of 1974, when I believe you entered nursing school or school of some sort part-time, what efforts did you make to find other employment?

A. I went to other places. I went to the VW place, the Toyota place, Dickson Ford. I believe in this time I went to Eastern, Delta and Piedmont and I went back to the places I had gone before.

Q. Did you ever get offered employment at any of these locations?

A. No, sir, I didn't.

* * *

UNITED STATES DISTRICT COURT
EXCERPTS FROM
SPECIAL MASTER'S REPORT

* * *

Year	Wages
1971	$ 222.48
1972	1,293.60
1973	8,766.53
1974	4,427.93
1975	92.50
1976	1,300.98
1977	4,001.63

c. She received the following employer contributions to her hospitalization and life insurance:

Year	Contributions
1972	$ 92.71
1973	1,099.12
1974	756.48

7. When Gaddis and Starr entered CETA sponsored nurses training in September 1975, they did not remove themselves from the labor market. To each of them, nurses training was the best way to rejoin the labor force as a productive member. By that time, both had been unemployed for a considerable length of time even though each had been seeking employment, and this course of action was recommended very strongly by the North Carolina Employment Security Commission. Had a job as a picker/packer in defendant's Charlotte warehouse been offered either of them at the same time they were called upon to make a commitment to this training, they would have accepted the job with defendant.

8. The evidence demonstrates that both Gaddis and Starr, even though each was unemployed for a considerable period of time between August 1971 and September 1975, sought em-

ployment during these periods, and the amounts earned by each during this period were the amounts reasonably earnable by each of them.

9. After Gaddis and Starr entered the CETA program, they regarded the training they received as employment and were compensated at the minimum wage rate for the time they spent in training.

* * *

13. Had defendant employed Gaddis, Smith and Starr during the relevant time period, it would have made social security contributions on their behalf; however, there is no evidence indicating that its failure to do so has damaged any of them in any way.

14. In reconstructing the probable employment history of Gaddis, Smith and Starr, the parties have compared their employment history to the actual employment experience of either Blanchard, Coe or Rogers. As can be seen from the differences resulting from the different comparisons made in the proposed findings of fact and conclusions of law submitted by the parties, it does make a difference; however, there is really no reason why it should. Having been hired first, Blanchard's seniority caused him to be laid off less than Coe, but there is no compelling reason in the record to conclude that any one of the three discriminatees would have been hired before the other but for the discrimination. The Court has indicated that this determination of the back pay award should be guided by the opinions in *White* v *Carolina Paperboard Corp.*, 564 F.2d 1073 (4th Cir 1977) and *United Transporation Union Local No. 974* v *Norfolk & Western Ry*, 532 F.2d 336 (4th Cir 1976), the cornerstone of both of which appears to be the

Supreme Court's statement in *Albemarle Paper Co.* v *Moody*, 422 U.S. 405, 95 S.Ct. 2362, at 2372 that the objective of an award of back pay is "to make persons whole for injuries suffered on account of unlawful employment history." That being so, the fairest way to develop a probable employment history is to combine Blanchard and Coe, to disregard Rogers who was absent excessively and employed for a comparatively short time, and to compare the composite with the actual employment history of each discriminatee.

15. The only question remaining to be resolved before the computation of the back award of each of the three can be made is what is the appropriate period of time to be compared — i.e., is it the entire period of discrimination or should the entire period be broken down into several shorter periods (quarterly or annually)? Though the methods utilized in, or statements taken out of context from, opinions of this Court and of the Fourth Circuit suggest one or other of these approaches, the question does not appear to have been consciously considered by either. At stake are earnings of the discriminatees during a period of layoff by defendant of those who were given the jobs they would have had but for the discrimination. In this case it makes very little difference to Gaddis and Starr since, essentially, they were unemployed during the layoff periods; however, Zettie Smith was employed throughout the period, and it may be that she would not have been able to obtain a job such as the one she had where it would have been to tide her over until called back to work. Considering the situation of Zettie Smith, there are two facts that stand out. One is her resourcefulness which is demonstrated by the facts that she is the only discriminatee in this matter who stayed employed through the entire period and also that she reapplied to defendant.

* * *

Opposition

Office-Supreme Court, U.S.
FILED
OCT 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-300

In the Supreme Court of the United States

OCTOBER TERM, 1981

FORD MOTOR COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the finding of both courts below, that petitioner had unlawfully discriminated in hiring on the basis of sex, was based on a proper allocation of the burdens of proof.

2. Whether, in the circumstances of this case, the court of appeals erred in holding that the district court did not abuse its discretion by awarding back pay to victims of employment discrimination for losses suffered after they had rejected an employment offer that did not include an offer of retroactive seniority.

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BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-4 to A-149) is reported at 645 F.2d 183. The district court's findings of fact and conclusions of law (Pet. App. A-152 to A-173) are unofficially reported at 19 Fair Empl. Prac. Cas. 1288.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1981, and the petition for rehearing was denied on May 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1975, the Equal Employment Opportunity Commission brought this Title VII employment discrimination action against petitioner Ford Motor Company in the United States District Court for the Western District of North Carolina. The Commission alleged that petitioner had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by discriminating against women in the hiring of employees at petitioner's automotive parts warehouse in Charlotte, North Carolina. Based on the trial evidence, the district court found that three qualified women—Smith, Gaddis, and Starr—applied for employment, but were rejected, at the Charlotte warehouse in the spring and summer of 1971. The court also found that petitioner hired three men to fill vacant positions (for which the women were qualified) at the warehouse during that summer.

At trial, petitioner relied on the testimony of its warehouse manager for the purpose of showing that petitioner had not considered the three women because they had not applied until after petitioner had hired the three men (Pet. App. A-14, A-17). However, the district court found that one of the women had applied before any of the men were hired, and that both of the other women had applied before jobs had been offered to two of the three men who were hired (*id.* at A-15 to A-160). Based on these findings, the court concluded that the Commission had established a prima facie case of sex discrimination, which petitioner had then failed to rebut (*id.* at A-167 to A-168). The court found further corroboration for this conclusion in the facts that petitioner had never hired women at the warehouse until November 1972, and that petitioner's hiring procedures

were both vague and based on highly subjective criteria (*ibid.*).

Petitioner also argued in the district court that back pay liability with respect to Gaddis and Starr should terminate with their rejections in 1973 of employment offers that petitioner had then made to each of them. The district court rejected that argument. At the time that petitioner originally failed to hire Gaddis and Starr in 1971, they were on layoff from similar positions at a General Motors parts warehouse. They were recalled by GM in January 1973, and they worked at the GM warehouse until January 1974, when the warehouse was closed (Pet. App. A-162 to A-163). The district court found that Gaddis and Starr had refused petitioner's 1973 employment offer because neither wished to lose the seniority that she had accrued at GM, and neither wished to be the only woman employed at petitioner's warehouse (*id.* at A-162 to A-163). The court therefore concluded that the refusals of Gaddis and Starr to accept the positions that were offered to them in July 1973 should not terminate petitioner's liability for back pay "inasmuch as neither [woman] would have been confronted by that decision and its implications had both been hired in August, 1971" (*id.* at A-170 to A-171).

2. The court of appeals affirmed by divided vote, holding unanimously that petitioner's 1971 failure to hire the three women violated Title VII, but one judge dissenting as to relief. The court of appeals upheld, as not clearly erroneous, the district court's factual findings that the three women were qualified for employment and had applied before petitioner filled the vacancies (Pet. App. A-16, A-19, A-21). Because the Commission had established a prima facie case of employment discrimination (*id.* at A-12 to A-14), and the district court had found

to be factually unsupported the reason that petitioner had advanced for not hiring the women—that the positions had previously been filled—the court of appeals concluded that petitioner had failed to articulate a legitimate, non-discriminatory reason for failing to hire the women (*id.* at A-21 to A-22 n.5).

The court of appeals also held that the district court had not abused its discretion in continuing back-pay relief for Gaddis and Starr beyond the time that they rejected petitioner's 1973 offers of employment (Pet. App. A-39 to A-40). As the court of appeals pointed out, the district court had found that a principal reason for Gaddis' and Starr's rejections of petitioner's offers of "mere beginning employment" was that "they would have been forced to abandon their seniority at General Motors" (*id.* at A-32 to A-33). The court of appeals noted that "under Title VII * * * victims of discrimination need not accept job offers which include a loss of seniority in order to preserve their back pay rights" (*id.* at A-33). Thus, if petitioner's offer were viewed as sufficient to terminate its liability, the offer would have presented the women with an "intolerable choice" (*id.* at A-34). If the women rejected petitioner's offer and stayed at GM, they would forgo their rights to any further back pay. If they accepted the jobs offered in 1973, without the seniority that they would have earned at Ford but for the earlier discrimination, they would both lose their GM seniority rights and also face the usual perils associated with a lack of seniority, such as possible layoff at Ford (*ibid.*).[1]

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[1] The court of appeals also affirmed (Pet. App. A-53 to A-77) the district court's finding (*id.* at A-164, A-168, A-173) that petitioner discriminated against a group of seven female applicants when it hired a male in 1973. The court affirmed

ARGUMENT

The decision below is correct and does not, contrary to petitioner's contention, conflict with any prior decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Based on an isolated statement in the opinion of the court of appeals (Pet. App. A-14), petitioner contends (Pet. 21) that the court below improperly required petitioner to *prove* a legitimate, nondiscriminatory reason for the challenged employment decisions, and that the decision below therefore conflicts with this Court's decision in *Texas Department of Community Affairs* v. *Burdine*, No. 79-1764 (Mar. 4, 1981). Petitioner's contention is without merit, however, because the opinion of the court below is otherwise inconsistent with the meaning that petitioner seeks to give that isolated statement (Pet. App. A-22 n.5):

> In this case, Ford neither "articulated" nor "established" a legitimate nondiscriminatory reason for hiring the men, since the district court found that the facts did not coincide with Ford's representations. Ford insisted that the other women had not applied when the men were hired. The district court determined the truth to be that the women had applied beforehand. In this situation, Ford was left with no defense to the prima facie case of discrimination.

Clearly, petitioner advanced a legitimate nondiscriminatory reason for its decisions, but the Commis-

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the award of back pay to this group, and rejected petitioner's other challenges to the Gaddis and Starr back pay awards. The court of appeals also remanded the case for consideration of further relief for the women affected by petitioner's discriminatory practices. Petitioner does not seek review here with respect to these aspects of the holding below.

sion showed that reason to be pretextual in that it was "unworthy of credence." *Texas Department of Community Affairs* v. *Burdine*, *supra*, slip op. 7. Thus, the decision of the court of appeals was not based, as petitioner suggests, on the erroneous view that petitioner was required to "prove" a legitimate, nondiscriminatory reason for its actions, but merely upon the factual finding that the reason articulated by petitioner was a pretext. Although the court below may not have used the precise language that this Court used in *Burdine*, the same rationale was employed.

Although the district court properly held that the reason articulated by petitioner was a mere pretext, petitioner effectively asks that this Court search the record to uncover additional reasons, which were allegedly "overlooked" by both lower courts, to support petitioner's refusal to hire the women (Pet. 23-24).[2] Petitioner attempts to disguise this request as an argument concerning the burden of proof, but petitioner's argument amounts to nothing more than a contention that the lower courts misunderstood its stated reasons. At all events, not only does the record fully support the court of appeals' character-

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[2] Specifically, petitioner now contends that it failed to hire Gaddis and Starr because two of the men, Blanchard and Coe, had applied earlier (Pet. 22-23). That contention is unsupported by the factual findings made below. Petitioner also asserts that Smith was not hired because she did not specify which job she wanted when she applied (*id.* at 24). With respect to Smith, petitioner's original and belated reasons must fall in light of the district court's finding (which the court of appeals found to be not clearly erroneous) that Smith applied "for a warehouse job" and that "her application was never seriously considered" (Pet. App. A-157 to A-158).

ization of petitioner's stated reasons, but any question that might be raised would constitute merely a question of fact, which would not warrant review by this Court.[3]

2. Petitioner also attacks the holding below insofar as the court of appeals upheld the district court's determination that the Gaddis and Starr back pay awards should not terminate at the time of their rejections of Ford's 1973 employment offers. However, this argument is based on the mistaken premise that the court of appeals held that rejection of an offer of employment would not terminate an employer's back pay liability unless the offer includes back pay (Pet. 9-10 & n. 8, 14). In fact, petitioner's failure to offer back pay as part of its offer of employment played no part in the holding below. The court of appeals merely held that Gaddis' and Starr's rejections of petitioner's offers did terminate petitioner's back pay liability because, in the circumstances of this case, it was reasonable for Gaddis and Starr to decline to abandon their GM seniority (which they had earned following petitioner's original refusal to hire them) to accept entrance level employment with petitioner. The actual holding of

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[3] Petitioner also contends (Pet. 23) that the decision below is inconsistent with *Burdine* in that the court of appeals required petitioner to prove that the men it hired were "more qualified" than the three women. As this Court recognized in *Burdine*, an employer does not violate Title VII by choosing a qualified man over an equally qualified woman. In this case, however, petitioner has admitted that it never even considered the qualifications of the three women (see Pet. 22-23). Thus, as the court of appeals stated (Pet. App. A-17 to A-18 n.3), "Ford can hardly defend itself on the basis of relative qualifications when it never evaluated the qualifications of the women."

the court of appeals is fully consistent with well-established principles of law under both Title VII and the National Labor Relations Act.

As petitioner concedes, the court of appeals did not expressly state that an employer must offer back pay as well as retroactive seniority (Pet. 10 n.8). Moreover, there is no basis for petitioner's contention (*ibid.*) that the court's reasoning carries the implication that back pay must be offered. The court of appeals merely stated that "victims of discrimination need not accept job offers which include a loss of seniority in order to preserve their back pay rights" (Pet. App. A-33). Accord, *United Transportation Union* v. *Norfolk & Western Ry.*, 532 F.2d 336 (4th Cir. 1975), cert. denied, 425 U.S. 934 (1976); *Hairston* v. *McLean Trucking Co.*, 520 F.2d 226 (4th Cir. 1975). The rationale of the court's holding is clear: an employment offer that requires victims of discrimination to risk the employment security that they have gained, despite that discrimination, to continue to be eligible for some back pay award that might be available in the future would present an "intolerable choice" (Pet. App. A-33 to A-34).

Contrary to petitioner's assertion (Pet. 10 n.8), the court of appeals did not find—or even suggest—that petitioner's offer was inadequate because it failed to "make whole" Gaddis and Starr. The court reasoned merely that the two women were not required, to remain eligible for some possible future back pay relief under Title VII, to risk the job security that they had gained following petitioner's discriminatory refusal to hire. Thus, the court of appeals suggested that an offer of retroactive seniority would have made the employment offer acceptable in this case (Pet. App. A-35). The alleged requirement that accrued back pay be offered is nowhere men-

tioned in the opinion of the court of appeals. Indeed, the offer of back pay would be irrelevant under the court's rationale because it would not affect job security, which was the sole focus of the court's reasoning.[4]

Similarly, petitioner relies (Pet. 17-19) on a number of cases[5] for the proposition that an uncondi-

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[4] Petitioner's reliance on the court's citation of two cases requiring a back pay offer to terminate an employer's back pay liability is misplaced. See *Comacho* v. *Colorado Electronic Technical College, Inc.*, 590 F.2d 887 (10th Cir. 1979) (per curiam), and *Jurinko* v. *Edwin L. Wiegand Co.*, 477 F.2d 1038 (3d Cir.), vacated on other grounds, 414 U.S. 970 (1973). The context in which the court cited these cases makes clear that the court intended only to demonstrate that other courts had considered, in determining whether such offers should terminate back pay liability, the burdens that may be unjustly imposed upon a victim of discrimination in accepting an employment offer. The reasoning of the court of appeals depends neither explicitly nor implicitly upon the holdings of those cases. Petitioner's reliance (Pet. 10 n.8) on *Saunders* v. *Hercules, Inc.*, 25 Fair Empl. Prac. Cas. 885, 889 (W.D. Va. 1981) is also misplaced. The district court's reading in *Saunders* of the Fourth Circuit's opinion here can neither add to nor detract from the holding itself. Likewise, petitioner's reliance (Pet. 16-18) on several decisions under the National Labor Relations Act is misplaced because the alleged conflict between those decisions and the decision below is also premised upon the erroneous view that the opinion below required that back pay be offered as part of an offer of employment.

[5] See, *e.g.*, *NLRB* v. *Harrah's Club*, 403 F.2d 865, 871 (9th Cir. 1968); *Polynesian Cultural Center, Inc.* v. *NLRB*, 582 F.2d 467 (9th Cir. 1978); *Bon Hennings Logging Co.* v. *NLRB*, 308 F.2d 548, 555-558 (9th Cir. 1962); *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976); *Kenston Trucking Co., Inc.* v. *NLRB*, 544 F.2d 1165, 1166-1167 (2d Cir. 1976).

tional offer of reinstatement terminates back pay. However, the relevance of these cases is limited because, with one exception,[6] they do not involve a situation in which a victim of discrimination risked losing job security if he accepted the offer. The equitable considerations underlying the decision below therefore were not present in these cases. Thus, as the court of appeals noted (Pet. App. A-38 n.9), it is self-evident that an offer of reinstatement neces-

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[6] The only case that petitioner cites involving a situation in which acceptance of an offer of reinstatement carried with it a possible loss of job security, *NLRB* v. *Izzie*, 395 F.2d 241, 244-245 (1st Cir. 1968), supports the rationale of the decision here. In *Izzie*, the employer offered reinstatement to all discharged employees, knowing that job openings were limited, and that some employees would be laid off immediately if all accepted the offers. In fact, none of the former employees accepted the offers. In discussing whether back pay liability should terminate at the time of the offer in such circumstances, the court noted (*id.* at 245):

> We can understand that discriminatees who were then employed elsewhere, even if at less pay, might not want to give up their work simply to be laid off by respondent, and we can understand that even those for whom a working position was open might be unable to come forthwith. Respondent is, perhaps wrong in saying his obligation ceased the day he mailed the letters. However, any discriminatee who was free should have returned immediately after receipt. We would suggest that all others should return as promptly as possible, or, if they feared there were insufficient vacancies, should at least have inquired.

Implicit in the court's reasoning is the conclusion that a discriminatee would not be required to accept a reinstatement offer if doing so would require a loss of job security.

sarily includes restoration of previously-held seniority, whereas an offer of beginning employment necessarily includes no seniority. Generally, an employee who accepts reinstatement will ordinarily be improving his job security by doing so.

The approach of the court of appeals in this case is fully consistent with the remedial scheme of Title VII, which grants broad equitable powers to "make whole" victims of discrimination. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). The holding properly permits the district court to consider the discriminatee's reasons for declining a job offer when determining when back pay relief should be terminated. Because, contrary to petitioner's assertions (Pet. 9-13), the holding below does not require employers to offer back pay, an employer can offer employment with retroactive seniority without, as petitioner asserts (Pet. 10), "surrender[ing] any meaningful right to contest the claimant's allegations." By making it more feasible for Title VII claimants to accept reemployment offers, the holding below also increases the likelihood that such offers will be accepted, and thus serves to advance, rather than impede, Congress' preference for conciliation and settlement in Title VII cases.

The holding of the court of appeals is also consistent, as the court of appeals recognized (Pet. App. A-35 to A-39), with well-established Title VII and NLRA case law. See *United Transportation Union* v. *Norfolk & Western Ry., supra; Hairston* v. *McLean Trucking Co., supra; Claiborne* v. *Illinois Central R.R.*, 583 F.2d 143, 153 (5th Cir. 1978), cert. denied, 442 U.S. 934 (1979). In each of these

cases, the court concluded that a victim of discrimination need not, for purposes of preserving possible back pay rights, accept an employment offer that included a loss of seniority or failed to include retroactive seniority. Contrary to petitioner's assertion (Pet. 14 n.9), these cases do not turn on the fact that an acceptance of the offer would expose the victim to yet another aspect of the employer's discriminatory employment policy. Rather, the decisions rest, quite properly, upon the concern that such offers require victims of discrimination to risk employment security that they have gained in spite of discrimination "in order to remain eligible for purely speculative future back pay relief" under Title VII. *United Transportation Union* v. *Norfolk & Western Ry.*, *supra*, 532 F.2d at 340. Requiring such a choice would "manifestly frustrate the 'broad objectives' of Title VII." *Hairston* v. *McLean Trucking Co.*, *supra*, 520 F.2d at 232. Under the remedial scheme of Title VII, the "disadvantages * * * of returning * * * without retroactive seniority" for a particular individual could "more than justify * * * refusing an offer of reinstatement." *Claiborne* v. *Illinois Central R.R.*, *supra*, 583 F.2d at 153. The critical factor in all of these decisions is not that the loss of seniority resulted from the employers' policies, but that requiring such a loss, as a prerequisite for continued eligibility for Title VII relief, is contrary to the remedial purposes of the Act. The same rationale applies here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I. The EEOC's brief in opposition is predicated primarily on the fallacious claim that the court below did not hold that Ford's offers of employment were inadequate in failing to include back pay. This is the first time that the EEOC has ever intimated that the claimants were not entitled to job offers that included back pay. Indeed, opposing Ford's petition for rehearing in the court below, it criticized Ford for "stripping" the authorities cited by Ford of "their underlying make whole rationale," which obviously embraces back pay as well as retroactive seniority [EEOC Reponse 7]. Moreover, the District Court's order, which the Court of Appeals approved, required Ford to provide back pay.

In repudiating its own "make whole" principle, the EEOC seeks to distinguish the Fourth Circuit's holding that a job offer must include retroactive seniority from any requirement, rejected in the cases cited by Ford, that a job offer must include back pay.

The EEOC's attempt to escape the conflict in the decisions fails since the Fourth Circuit's holding cannot be reconciled with the statements in the cases cited by Ford that an unconditional job offer cuts off back pay.[1] Moreover, it is manifest that the *foundation* of the Fourth Circuit's holding is the "make whole" principle, previously espoused by the EEOC itself.

The opinion below states that the purpose of requiring an offer of retroactive seniority is "to alleviate the effects of the discrimination" [A-35]. In support of that proposition, the majority quotes a passage from *Comacho v. Colorado Electronic Technical College, Inc.*, 590 F.2d 887 (10th Cir. 1979) (per curiam), in which the Tenth Circuit requires that a job offer include back pay so as to "'make whole' as nearly as possible any person injured . . . " [A-36]. Next, the majority quotes from *Jurinko v. Edwin L. Wiegand Co.*, 447 F.2d 1038 (3d Cir.), *vacated* 414 U.S. 970, 94 S. Ct. 293 (1973):

> The terms of the 1969 job offers were within Wiegand's control, and it did not offer the plaintiffs *back seniority or back pay*. The offer that was made did not rectify the effects of its past discrimination, and the plaintiffs were under no duty to accept such an offer.

[A-36 – 37] (emphasis supplied).

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[1]The EEOC's brief in opposition does not dispute the unconditional nature of Ford's job offers.

In the face of these passages and the Fourth Circuit's express statement that its holding is in accord with them, the EEOC's assertion that Ford's failure to volunteer back pay "played no part in the holding below" [Brief 7] cannot stand.[2] The majority's analysis, like that of *Comacho* and *Jurinko*, is clearly based on a "make whole" rationale that conflicts with the cases cited by Ford, and the cases cited by Judge Hoffman in his dissent, holding that rejection of an unconditional job offer cuts off further back pay.

II. Indeed, even if there were no conflict among the cases, the certainty that the Fourth Circuit's decision will have an enormous negative impact on the fair and efficient handling of employment discrimination claims necessitates review by this Court. The EEOC's brief ignores these critical questions of federal policy.[3]

If an unconditional offer to a discrimination claimant has no effect on further back pay unless the offer is combined with an offer of retroactive seniority, an employer evaluating a claim of discrimination — without knowing how the claim might be adjudicated — must proceed with such an offer at the risk of violating his collective bargaining agreement, abridging

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[2]In fact, the first court to have considered the decision below interpreted the holding as Ford does. In that case, *Saunders v. Hercules, Inc.*, ____ F. Supp. ____, 25 FEP Cases 885, 889 (W.D. Va. 1981), the court flatly declared that the decision below relieves discrimination claimants from the obligation to accept reemployment offers unless back pay is also offered.

[3]The EEOC does not dispute the broad reach of the Fourth Circuit's holding. It will apply not only to claims under Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000E, *et seq.*, but also to those brought pursuant to the National Labor Relations Act, 29 U.S.C. §§ 151-69, and the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*

the accrued seniority rights of present employees, and creating overall havoc in employer / employee relations. For these reasons, the requirement that an employer combine retroactive seniority with an unconditional job offer to each discrimination claimant is certainly more pernicious than a requirement that he offer back pay.

The EEOC has contended that the rule of this case will make it "more feasible for Title VII claimants to accept reemployment." That contention assumes, of course, that employers will make such offers. A much more likely result is that an employer mindful of the impact of such an offer on other employees, on any applicable collective bargaining agreement, and on his ability to contest the discrimination claim, will almost never make the offer in the first place, and cases will not be conciliated.

III. Ford also contended in its petition that the writ should be granted because the Fourth Circuit's decision imposed on Ford a burden of proof expressly rejected by this Court in *Texas Department of Community Affairs v. Burdine*, ___ U.S. ___, 101 S. Ct. 1089, 1096 (1981). The EEOC accuses Ford of selecting "an isolated statement" from *Burdine* [Brief 5], suggesting that the true reasoning of the Court can be drawn from a footnote later in the opinion.

In fact, the Fourth Circuit's statement that Ford bore the *burden of proving* its legitimate reasons for its hiring is a crucial step in the court's opinion. The statement is a part of the court's explanation of the proof scheme that must be followed in Title VII cases [A-14]. That explanation of the governing legal principles serves as the framework for the

immediately following analysis of the issue whether Ford was properly found to have discriminated on the basis of sex. Because the framework for analysis was improperly constructed, the conclusion that Ford failed to rebut a prima facie case is obviously unsound.

The EEOC also suggests, apparently in the alternative, that the weight of the burden imposed on Ford is of no importance since Ford's explanation of its hiring decision is "unsupported by the factual findings made below" [Brief 6, n. 2].

That suggestion is demonstrably wrong. Ford showed at trial and argued in its earliest brief on appeal that it had hired two males instead of the female claimants because the males applied first and were, at a minimum, qualified. Neither a factual dispute nor any pretext has been shown with respect to Ford's explanation. Indeed, the district court explicitly stated that both men applied before either woman applied [App. A-158 – 59] and that both men had prior warehouse experience [A-158]. That experience was clearly the same type of experience the district court relied on in finding Gaddis and Starr qualified [A-159]. Ford cannot, of course, explain with certainty the failure of the court below to address Ford's contention that its evidence showed a legitimate reason for failing to hire the women. Ford submits that the court's error was, at least in part, the result of a misunderstanding of the appropriate burden of proof that has now been clarified by *Burdine*. Ford submits that it is fully proper for this Court to remand this case

for reconsideration in light of *Burdine* to insure that this litigant's defense is properly considered and that the law as stated by this Court governs in the Fourth Circuit.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

1. WHETHER BACK PAY DUE AN EMPLOYMENT DISCRIMINATION CLAIMANT CONTINUES TO ACCRUE AFTER THE CLAIMANT HAS REJECTED AN UNCONDITIONAL JOB OFFER THAT DOES NOT INCLUDE RETROACTIVE SENIORITY OR BACK PAY.

2. WHETHER THE FOURTH CIRCUIT ERRED IN HOLDING THAT FORD HAD THE BURDEN OF PROVING ITS LEGITIMATE, NONDISCRIMINATORY REASONS FOR ITS HIRING DECISIONS.

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BRIEF FOR FORD MOTOR COMPANY

OPINIONS BELOW

The opinion of the court of appeals is reported at 645 F.2d 183 (4th Cir. 1981). That opinion is reproduced in the separate Appendix to the Petition for a Writ of Certiorari, submitted by Ford Motor Company ("Ford"),[1] at A-4-149.[2]

[1]Ford has no parent company. Ford reports the following affiliate companies and subsidiaries that are not wholly owned pursuant to Sup. Ct. R. 28.1: Eveleth Taconite Company, Ford Motor Company of Canada, Limited, Ford Motor Company [Belgium] N.V., Ford Motor Company A/S [Denmark], O/Y Ford A/B [Finland], Ford Motor Company Aktiebolag [Sweden], Ford Brasil S.A., Ford Lio Ho Motor Company, Ltd. [Taiwan], Toyo Kogyo Co. Ltd. [Japan].

[2]The Appendix to Ford's Petition for a Writ of Certiorari is cited as "A"; the Joint Appendix that has been prepared pursuant to Supreme Court Rule 30 is cited as "JA"; and the record of the proceedings in the district court is cited as "R."

The Findings of Fact and Conclusions of Law of the District Court for the Western District of North Carolina, dated December 30, 1977, are not officially reported, but are reported at 19 F.E.P. Cases 1288 (W.D.N.C. 1978), and are reproduced in the Appendix at A-152-73. The Judgment of the district court, dated May 8, 1979, is unreported, but is reproduced in the Appendix at A-150-51.

JURISDICTION

The Fourth Circuit Court of Appeals entered judgment on March 19, 1981. Ford's petition for rehearing and suggestion for rehearing *en banc* was denied on May 18, 1981. Ford filed a petition for a writ of certiorari to the Fourth Circuit on August 14, 1981. The petition was granted on November 9, 1981. This Court has jurisdiction to review the court of appeals decision by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent statutory provisions are reproduced at A-1-2. They are sections 703(a), 703(j) and 706(g) of the Civil Rights Act of 1964, as amended, Title VII, 42 U.S.C. § 2000e-2(a), (j), and -5(g).

STATEMENT OF THE CASE

I. Procedural Background

Respondent Equal Employment Opportunity Commission ("EEOC") brought suit against Petitioner Ford Motor Company ("Ford"), alleging that Ford had violated Title VII, 42 U.S.C. § 2000e-2(a), in failing to hire several women at its automotive parts warehouse in Charlotte, North Carolina. Judy Gaddis, Rebecca Starr and Zettie Smith were among the claimants alleging sex discrimination. The district court found that Ford had discriminated against Gaddis, Starr, and Smith

and awarded them back pay accruing through the date of judgment.

The Fourth Circuit Court of Appeals unanimously affirmed the findings of the district court that Ford was liable for gender discrimination in failing to hire Gaddis and Starr, and, by a two-to-one vote, affirmed the district court's finding in favor of Smith. Also by a two-to-one vote, the court of appeals upheld the district court's framing of the periods for back pay.

Ford filed a timely petition for rehearing and suggestion for rehearing *en banc*, urging primarily that the court of appeals had erred in holding that, since Ford's unconditional offers of employment to Gaddis and Starr had not provided for retroactive seniority and back pay, the offers did not stop the subsequent accrual of back pay. In addition, Ford contended that the court of appeals had erroneously imposed on Ford not only the burden of producing evidence to rebut prima facie cases of discrimination, but also the burden of proving legitimate reasons for its hiring decisions, a burden expressly rejected by this Court in *Texas Dept. of Community Affairs v. Burdine*, ___ U.S. ___, 101 S. Ct. 1089 (1981). The petition for rehearing was denied by a two-to-one vote of the panel that had heard the appeal, and the suggestion for rehearing *en banc* was denied by a four-to-four vote upon a poll of the active judges [A-3].

II. Facts

At trial, the district court found that Judy Gaddis and Rebecca Starr had applied for employment at Ford's automotive parts warehouse in Charlotte, North Carolina, on July 21, 1971 [A-159]. Both had recently been laid off by General Motors Corporation, in whose Charlotte parts warehouse they had worked for ten months as "picker-packers," "picking" ordered parts from storage, and "packing" them for shipment [JA 39, 50]. At the time they applied for jobs with Ford, no

woman had ever been employed for that type of work in Ford's warehouse.[3] In August 1971, two men, J. A. Blanchard and P. E. Coe, began to work in Ford's warehouse as "picker-packers." Blanchard and Coe applied *before* Gaddis and Starr, and both men had prior experience as warehouse workers [JA 35-37, A-158-59].[4] Upon Ford's hiring of Blanchard and Coe, Gaddis wrote to the EEOC, charging that Ford had refused to hire her because of her sex [R, Vol. II, at 279].

For the next several months following Gaddis' filing of the discrimination claim, Gaddis and Starr telephoned and visited Ford's Charlotte warehouse to seek employment [JA 31-33]. On those occasions, they were informed that their applications would be considered if and when job openings developed. There were no job openings at the warehouse until November 1972, when Gaddis and Starr, together with four other persons, were hired for temporary jobs reorganizing Ford's warehouse [A-161]. All six temporary employees were laid off when the work was completed about six weeks later [A-161].

In January 1973, shortly after the termination of their temporary employment with Ford, both Gaddis and Starr were recalled to work in their former positions in the General Motors warehouse [JA 41-42, 51]. In July 1973, while the women were still employed by General Motors, a permanent position became available in the Ford warehouse. Ford offered that

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[3]Ford introduced testimony that Gaddis and Starr were, in fact, the first women who ever applied for employment in its parts warehouse [JA 30, 70; R, Vol. II, at 451-55]. The district court found, however, that Zettie Smith had earlier applied for such employment [A-157]. There was no evidence, and there has been no suggestion, that any woman applied for a warehouse job either before the date of Smith's application or at any time between that date and the date on which Gaddis and Starr applied.

[4]The procedure by which Blanchard and Coe were selected is described in the text at 32-34, below. Ford introduced evidence about that procedure to rebut any prima facie case that Gaddis and Starr might have established.

position first to Gaddis [JA 61-63] and then to Starr [JA 64-65]. Both women refused Ford's offer, each stating that she did not want to be the only female employed in the Ford warehouse [JA 64-65, 67]. At trial they stated, as another reason for rejecting the offers, that they had not wanted to lose their accrued seniority at General Motors [JA 47, 54]. As Judge Walter E. Hoffman observed in his opinion dissenting in part, at the time the women rejected the offers, they did not inform Ford that they were reluctant to lose their seniority as General Motors employees, and they did not request that Ford give them retroactive seniority or back pay [A-88-89].

There is no evidence, and it has not been suggested, that the discussion between Ford and the two women involved *any* consideration of retroactive seniority or back pay. Nor is there any evidence that Ford asked either woman to surrender any claim connected with the pending employment discrimination charge.[5]

After rejecting Ford's unconditional offers of the warehouse job, Gaddis and Starr continued to work at the General Motors warehouse through January 25, 1974 [JA 42, 51], when General Motors moved its warehouse operations to Atlanta. Gaddis and Starr then lost their General Motors jobs when they declined to be transferred to the Atlanta warehouse. They were unemployed until September 1974, when both women entered nursing school on a part-time basis. Both became full-time nursing students in September 1975 [R, Vol. II, at 271; R, Vol. III, at 375].

Upon these facts, the district court concluded that Ford had discriminated against Gaddis and Starr on the basis of sex in failing to hire them in August 1971 and that they were

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[5]Neither the court of appeals nor the trial court faulted Ford's offers as conditional in any respect. Likewise, the EEOC acknowledged the unconditional nature of the offers at page 9 of its response to Ford's petition for rehearing.

therefore entitled to an award of back pay. The district court specifically held that the period of back pay liability extended past July 1973, the date of Ford's offers of employment [A-170-71], through December 30, 1977, the date on which the court entered its findings of fact and conclusions of law.

The evidence at trial concerning Zettie Smith was that she believed she had applied for a job with Ford in 1971 [JA 56]. When asked whether she had indicated she wanted a warehouse job, she testified: "I didn't indicate what job I applied for. I just, unless it was something in my line of work or whatever." [JA 59]. The district court based its finding that Smith applied for a warehouse job in 1971 solely on her uncertain recollection. Ford was unable to locate a 1971 application for Smith, and the EEOC introduced no such application into evidence at trial.[6]

Relying on this evidence, the district court found that Smith had, in June 1971, applied for a job with Ford "in line with her prior experience as a stock handler and shipper in a Charlotte textile plant." [A-157]. The district court concluded that Smith had not been hired in August 1971 because of her sex and awarded back pay for a period ending on December 30, 1977.[7]

III. The Court of Appeals' Decision

The Fourth Circuit upheld the district court's conclusion that Ford had discriminated against Gaddis and Starr on the basis of sex, indicating that Ford had not met its "burden of proving" its reasons for not hiring them [A-14]. Then, by a two-to-one vote, the court of appeals approved the district court's

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[6]In the course of discovery, Ford supplied the EEOC with all of the applications it had on file for the years 1971 through 1973. Among those were the 1971 applications relied upon by the EEOC to prove prima facie cases for Gaddis and Starr, and one that Smith submitted in 1973.

[7]The actual earnings of Smith, Gaddis, and Starr during their respective back pay periods were deducted in calculating their awards.

conclusion that Ford's unconditional offers of employment to the two women had no effect on the accrual of back pay. The court of appeals rejected Ford's argument that its job offers must be held to have cut off back pay, saying:

> Under Ford's legal theory, if Gaddis and Starr rejected Ford's offer and stayed at General Motors, they would forego their right to further back pay benefits. On the other hand, if they accepted the job offered by Ford, which they had not held for the previous two years because of Ford's discriminatory hiring policy, they would lose their seniority rights at General Motors.

[A-34].

> This failure of Ford to offer retroactive seniority prevents Ford from relying on its offers to Gaddis and Starr.

[A-38, n. 9].

Judge Walter E. Hoffman, dissenting from this holding, strongly urged that the law, as correctly stated and as held by the National Labor Relations Board and other circuit courts, is as follows:

> An unconditional offer of reinstatement that does not demand that the employee surrender his back pay or other claims is enough: the employer need not volunteer back pay or give up his right to defend against those claims.

[A-94-95][8].

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[8]Judge Hoffman dissented also from the majority's holding that the accrual of Ford's back pay liability was not terminated when Gaddis and Starr obtained employment in the General Motors parts warehouse or when they began full-time schooling. Although Ford considers the majority's holding on these issues as erroneous, it chose not to present them in its petition for a writ, believing the two issues presented to be of more importance.

The court of appeals' majority also affirmed the district court's finding that Ford had discriminated against Zettie Smith.

Again, Judge Hoffman disagreed:

> If [Smith] made out a prima facie case — that she applied, was qualified, and yet was rejected — Ford has rebutted that by articulating a legitimate non-discriminatory reason explaining why it did not hire her: It did not know she had applied for a warehouse job.

[A-126-27].

SUMMARY OF ARGUMENT

I.

Ford asks this court to reverse the Fourth Circuit's holding that back pay due an employment discrimination claimant continues to accrue after the claimant has rejected an unconditional job offer that does not include retroactive seniority or back pay.

The practical effect of the Fourth Circuit's holding, if it is permitted to stand, will be to undermine Title VII's policies of encouraging employers and discrimination claimants to conciliate employment discrimination claims voluntarily and of encouraging discrimination claimants to mitigate potential back pay damages. Moreover, the Fourth Circuit's holding is inconsistent with a line of cases decided under Title VII and under the remedial provision of the National Labor Relations Act (which served as the model for the remedial provision of Title VII, *see Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975)).

The conciliation of employment discrimination claims will be impeded because employers will be reluctant to combine

with an unconditional job offer to a discrimination claimant an offer of retroactive seniority and back pay. Any employer who makes such an offer will be, in effect, offering the claimant everything the claimant could expect to be awarded upon proving his or her claim in court. Thus, to stop the subsequent accrual of back pay, the employer would have to surrender any meaningful right to contest the claimant's allegations. Few employers will be willing to pay such a price to achieve the object of ending the accrual of back pay.

Employers will be further dissuaded from making the offer required by the Fourth Circuit's rule because of the certainty that any offer of retroactive seniority will prejudice the interests of present employees who are innocent parties and will result in turmoil in labor relations. Although courts and the National Labor Relations Board may, after finding liability, order defendant employers to grant retroactive seniority to discrimination claimants who have proved they were illegally discharged or illegally denied employment, employers who undertake to offer retroactive seniority in the absence of such an order will expose themselves to potential liability to present employees for breaching the usual seniority provisions in collective bargaining agreements.

Thus, if an employer who is aware of the rule adopted by the Fourth Circuit chooses to make *any* offer, these considerations will likely induce the employer to make only a "simple" unconditional offer, without any retroactive seniority or back pay. In light of the Fourth Circuit's holding in the present case, however, discrimination claimants will have a strong incentive not to accept such a "simple" offer, preferring, instead, to hold out for retroactive seniority and back pay. Inevitably, fewer discrimination claims will be conciliated, and Title VII's policy of encouraging cooperation and voluntary compliance will be frustrated.

The Fourth Circuit's rule will also work in opposition to Title VII's policy of encouraging discrimination claimants to use "reasonable diligence" to mitigate potential back pay damages, since it will permit a claimant to refuse the very job that he or she claims was discriminatorily denied without incurring any penalty.

Ford contends that the rule that should be applied in cases like the present one is, as Judge Hoffman urged in his dissent, that an employer's unconditional offer of employment to a discrimination claimant cuts off the subsequent accrual of back pay [A-94-95]. That rule, which the National Labor Relations Board and the majority of the circuits that have considered the issue have followed, provides the employer an incentive to offer the claimant the job that he or she had sought, provides the claimant an incentive to accept the job, requires neither the employer nor the claimant to waive any defense or claim, and avoids the disruption of labor relations. *See*, *e.g.*, *Moro Motors*, *Ltd.*, 216 N.L.R.B. 192 (1975); *National Screen Products Co.*, 147 N.L.R.B. 746 (1964).

The Fourth Circuit's majority opinion does not distinguish or discredit the line of cases that have adopted the rule that an unconditional job offer ends the subsequent accrual of back pay. Instead, the majority relies on two of its own prior decisions that are clearly distinguishable. The job offers that were held inadequate to cut off the accrual of back pay in those two cases would have required the claimants to sacrifice seniority that they had acquired while working for the defendant employer. Those two decisions do not govern in the present case, because, as Judge Hoffman notes, the claimants here "had never worked for Ford before except on a temporary basis, and thus had no seniority rights 'accrued' that they were being asked to 'forfeit.'" [A-102].

II.

This court held in *Texas Dept. of Community Affairs v. Burdine*, ___ U.S. ___, 101 S. Ct. 1089 (1981), that, to rebut an employment discrimination claimant's prima facie case, the defendant employer has only to "articulate some legitimate nondiscriminatory reason" for rejecting the claimant. ___ U.S. at ___, 101 S. Ct. at 1093.

The *Burdine* decision emphasizes that the burden on the defendant employer is only one of "production," and not of "proof or persuasion." ___ U.S. at ___, 101 S. Ct. at 1095-96. In the present case, although Ford certainly presented an explanation of its hiring decisions that was at least an "articulation" of a legitimate reason for failing to hire Gaddis, Starr, and Smith, the Fourth Circuit held that Ford had failed to rebut prima facie cases established by the three claimants. That holding was founded on the following view of Ford's burden:

> Ford had the *burden of proving* a legitimate, non-discriminatory reason for hiring the three men instead of Gaddis, Starr and Smith.

[A-14] (emphasis added).

The court of appeals' express premise that Ford bore a burden of "proof" rather than of "production" is contrary to *Burdine* and should therefore be set aside.

In addition to imposing on Ford a burden of proof that this court expressly rejected in *Burdine*, the Fourth Circuit erred further in failing even to consider Ford's explanation that it had legitimately chosen two men over Gaddis and Starr, without comparing them to Gaddis and Starr, because the males were qualified and because their applications were prior in time.

Because of these errors, the judgments for Gaddis, Starr, and Smith should be vacated and the case remanded so that Ford's rebuttal evidence can be properly evaluated in accordance with *Burdine* and its predecessor cases.

ARGUMENT

I. An unconditional job offer, whether or not it includes back pay or retroactive seniority, should be held to end the accrual of back pay due an employment discrimination claimant.

A. THE FOURTH CIRCUIT'S RULE IS CONTRARY TO TITLE VII'S POLICIES OF ENCOURAGING THE CONCILIATION OF EMPLOYMENT DISCRIMINATION CLAIMS AND THE MITIGATION OF DAMAGES.

1. *Introduction.*

An important objective of Title VII's remedial provision, § 706(g),[9] is to provide district courts with the authority to order relief that will "make whole" persons who prove they have suffered injuries on account of unlawful employment discrimination. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). As this Court has held, it follows from the "make whole" objective that once illegal employment discrimination is proved, the claimant is presumptively entitled to back pay, *id.* at 422, and retroactive seniority, *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 770-773 (1976), in addition to the job that was discriminatorily denied.

This Court has not, however, decided whether an employer can cut off the subsequent accrual of back pay due an employment discrimination claimant by unconditionally offering the claimant the job the claimant had previously sought without success. Most lower courts that have considered the issue, and the National Labor Relations Board ("NLRB" or "Board"), have held that an employer's unconditional offer of employment to a discrimination claimant terminates the accrual of back pay.[10] In the present case, the Fourth Circuit declined to

[9] 42 U.S.C. § 2000e-5(g), reproduced at A-2.

[10] These decisions are discussed below at 21-27.

follow those decisions, holding, instead, over a strong dissent, that Ford's unconditional offers of employment to Gaddis and Starr did not stop the accrual of back pay.

Ford submits that the Fourth Circuit's holding is contrary to Title VII's policy of encouraging cooperation and voluntary compliance in eliminating employment discrimination. *See Alexander v. Gardner-Denver Company*, 415 U.S. 36, 44 (1974). The holding will severely impede the conciliation of employment discrimination claims.

The Court's holding is particularly far-reaching because it will govern not only the handling of claims of employment discrimination brought under Title VII, but also the handling of discrimination claims brought under the National Labor Relations Act.[11] As this Court has indicated, the back pay provisions of Title VII and of the National Labor Relations Act should be applied in the same manner, the N.L.R.A. back pay provision having served as the express model for the Title VII provision. *Albemarle Paper Company v. Moody*, 422 U.S. at 418-22. Presumably, the Court of Appeals' holding would also apply to the calculation of back pay under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*

2. *The Fourth Circuit's rule unfairly forces employers who seek to cut off the accrual of potential back pay liability to surrender their rights to contest employment discrimination claims.*

The court of appeals' holding means that the only way an employer charged with employment discrimination can stop the accrual of potential back pay liability is to combine with his offer to employ the claimant an explicit offer of retroactive

[11]National Labor Relations Act, 29 U.S.C. §§ 151-69.

seniority and, apparently, back pay.[12] That holding puts employers charged with employment discrimination in an intolerable situation. An employer will be able to stop the accrual of back pay only by giving the claimant everything the claimant could be awarded if the charge of discrimination were to prevail in court.[13] Thus, to stop the accrual of potential back pay liability, the *employer must surrender any meaningful right to contest* the claimant's allegations, even if they appear to be unfounded. In effect, the court of appeals' holding requires the employer to provide the claimant with a type of job insurance:

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[12]Although the court of appeals did not *expressly* state that the employer must offer back pay as well as retroactive seniority, the court's reasoning unambiguously implies that such an offer of back pay is necessary. First, the court relied on two cases, *Comacho v. Colorado Electronic Technical College, Inc.*, 590 F.2d 887 (10th Cir. 1979) (*per curiam*), and *Jurinko v. Edwin L. Wiegand Co.*, 477 F.2d 1038 (3d Cir.), *vacated*, 414 U.S. 970 (1978), which *did* expressly hold that employment discrimination claimants are under no duty to accept an offer without back pay. Moreover, the court's reasoning that Ford's offers of employment without retroactive seniority were inadequate because they failed to "make whole" the claimants, although erroneous in Ford's view, would obviously apply equally to an offer without back pay.

The first district court called upon to apply the court of appeals' holding squarely confirmed this implication:

> It is clear from [*EEOC v. Ford Motor Company*] that a person who has been discriminated against does not have to accept an offer of reemployment where back pay has not been offered.

Saunders v. Hercules, Inc., 510 F. Supp. 1137 (W.D. Va. 1981).

[13]The Fourth Circuit's holding might well require the employer to give the claimant even *more* than a court would award after finding illegal employment discrimination, since a court would reduce any back pay award by "interim earnings or amounts earnable with reasonable diligence." 42 U.S.C. 2000e-5(g). Ordinarily, the employer will have no information about a claimant's interim earnings, and the employer will obviously be in no position to judge what amounts the claimant might have earned "with reasonable diligence." Even if the employer had the information and the expertise necessary to calculate the proper reductions in back pay awards, the employer might, nevertheless, be compelled to give a claimant back pay with no reductions since any offer with reduced back pay could be attacked as failing to "make whole" the claimant.

the claimant would be permitted to reject the employer's offer simply because he or she preferred his or her current employment and, if that employment were to end for any reason, the claimant would then be permitted to collect "back pay" from the employer for the periods before and after the term of that other employment. That result would obtain even if, as in the present case, the claimant never requested retroactive seniority or back pay, and no one said anything about it [A-106-07 (Hoffman, J., dissenting in part)].

3. *Job offers that comply with the Fourth Circuit's rule would disrupt labor relations and would interfere with the rights of present employees who are innocent third parties.*

Besides its manifest unfairness to employers, the holding is particularly unfair to those employers' employees. If an employer, of his own accord, offers retroactive seniority to a discrimination claimant, those who will be most harmed are the present employees with accrued seniority.

Judge Hoffman emphasized this point in his dissent:

> [To give claimants retroactive seniority] would be unfair to present employees with accrued seniority; probably would create havoc in employer/employee relations, especially if the Company is unionized; and might be in clear violation of the employer-employee contract. *See Meadows v. Ford Motor Company*, 510 F.2d 939, 949 (6th Cir. 1975), *cert. denied*, 425 U. S. 998 (1976), ("... where the burden of retroactive pay falls upon the party which violated the law, the burden of retroactive seniority for the determination of layoff would fall directly upon other workers who themselves had no hand in the wrongdoing found by the District Court.")

[A-102-03].

Ford recognizes that courts and the National Labor Relations Board, *after finding liability*, certainly have the power to order defendant employers to grant retroactive seniority to claimants illegally discharged or illegally refused initial employment. *See Franks v. Bowman Transportation Co.*, 424 U.S. at 762 (1976). It by no means follows, however, that *employers* should be encouraged, much less required, to do so unilaterally. Involved in the contemplation of any award of retroactive seniority is the balancing of the inevitable harm that would result to present employees with accrued seniority against the wrong that would be done to the claimant if a valid claim for such retroactive seniority should be denied. That balancing should be done only by a court or the Board.

The language of section 706(g) clearly supports Ford's contention that it is a *court* which is to determine what relief is appropriate to remedy a violation of Title VII, and that the court will order such relief only *after* finding that an employer has engaged in unlawful employment discrimination: "*If the court finds* that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, *the court may . . . order* such affirmative action as may be appropriate . . . ." 42 U.S.C. 2000e-5(g) (emphasis supplied).

Moreover, this Court has emphasized that even where employment discrimination has been proved, an award of retroactive seniority is not appropriate in all circumstances and that "[t]he fashioning of appropriate remedies invokes the sound equitable discretion of the district courts." *Franks v.*

Bowman Transportation Co., 424 U.S. at 770. It is anomalous that the Fourth Circuit has required employers who wish to terminate the accrual of back pay to offer retroactive seniority in the absence of any finding of liability, even though a district court might properly choose not to order such relief even *after* liability is proved.

As a practical matter, an employer who reacts to a charge of discrimination with an offer of retroactive seniority will open itself to claims, by present employees, that it has breached the seniority provision of the labor contract with them. Only if a court or the Board has *ordered* such relief, after finding the employer has engaged in unlawful employment discrimination, can an employer offer retroactive seniority without incurring this potential liability to present employees or their union.

Even if employers could offer retroactive seniority to employment discrimination claimants without fearing liability to present employees with accrued seniority or their union, another grave practical problem inheres in the Fourth Circuit's holding. Seniority systems are instituted primarily for the benefit of employees, not employers. *See* Cooper & Sobol, "Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotions," 82 Harv.L.Rev. 1598, 1604-05 (1969). Employers who are permitted to act with impunity can be expected to protect themselves from continuing back pay liability by sacrificing the interests of present employees who are innocent third parties. Moreover, employers will be deciding to make such offers without limitations or criteria like those that would be present in a properly drawn affirmative action plan. It is

unwise to adopt a policy that encourages employers to make such self-interested and ad hoc decisions.[14]

4. *The Fourth Circuit's rule will disadvantage discrimination claimants by impeding conciliation of their claims.*

The Court of Appeals' decision will disadvantage even employment discrimination *claimants* since the decision will impede voluntary, partial resolution of discrimination charges. Employers do not relish the prospect of offering employment to persons who have charged them with intentional discrimination. The strongest incentive the employer can find for making such an offer lies in the prospect of minimizing potential back pay liability. An employer who is aware of the Fourth Circuit's formulation of what a job offer must include to cut off further back pay will, however, almost certainly decline to make such an offer because of the effect of the offer on other employees, on any applicable collective bargaining agreement, and on the employer's ability to contest the discrimination claim. If the employer chooses to make *any* offer, these considerations will induce the employer to make only a "simple" offer of employment, without any retroactive seniority or back pay. Because of the Fourth Circuit's holding, however, claimants will have a strong incentive not to accept a simple unconditional job offer; they may prefer to hold out for retroactive seniority and back pay. In fact, it can be

[14]The havoc that would result from an employer's offering retroactive seniority is by no means confined to unionized companies. The seniority concept plays an integral role in the competitive bidding and job posting procedures frequently utilized to ensure equal employment opportunity, even if no labor agreement requires such procedures. In each case in which a job might be tendered to a discrimination claimant, the non-union employer, mindful of the Fourth Circuit's rule, will have to decide whether an offer that will cut off his back pay liability is preferable to disrupting the relative seniority positions of his employees who rely on the company's bidding and posting procedures.

expected that claimants' counsel will advise them to reject such offers.[15] The conciliation of discrimination claims will inevitably suffer, thus frustrating Title VII's policy of encouraging cooperation and voluntary compliance to the greatest possible extent. *See Alexander v. Gardner-Denver Company*, 415 U.S. 36, 44 (1974). Instead, the rule announced in this case will cause employers to award no relief without litigation, thus delaying Title VII's ultimate objective of insuring equal employment opportunities.

5. *The Fourth Circuit's rule permitting claimants to reject unconditional job offers will frustrate Title VII's policy of encouraging the mitigation of damages.*

In addition, the Fourth Circuit's rule is contrary to the Congressional purpose expressed in the requirement of Section 706(g) that a discrimination claimant use "reasonable diligence" to mitigate potential back pay damages. It is well established that this "mitigation of damages" provision of Section 706(g) obligates an employment discrimination claimant to accept employment comparable to that which the claimant has been discriminatorily denied. *See, e.g., Falls Stamping & Welding Co. v. International Union, United Auto, Aircraft & Agricultural Workers of America*, 485 F. Supp. 1097 (D.C. Ohio 1980); *see also, National Labor Relations Board v. Mastro Plastics Corp.*, 354 F.2d 170, 179 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966). It violates logic and

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[15] *Jurinko v. Edwin L. Wiegand Co.*, 477 F.2d 1038 (3d Cir. 1973), confirms the potential of the Fourth Circuit's decision for thus impeding voluntary, partial resolution of employment discrimination charges. In *Jurinko*, on which the majority below relied, the claimants had refused to accept the employer's unconditional job offers on the express advice of the EEOC. The Fourth Circuit's decision will, of course, encourage the EEOC and claimants' counsel to give that same advice to future claimants.

common sense to require the claimant to accept a "comparable" job from another employer, without, of course, any back pay or retroactive seniority, while freeing the claimant from any obligation to accept the *same* job that he or she claims was discriminatorily denied.

6. *A rule was available to the Fourth Circuit that would have served the policies of Title VII and avoided the problems identified above.*

Judge Hoffman, who dissented from the court of appeals' decision on this point, urged the adoption of a rule that would be more equitable to discrimination claimants, to employers, and to present employees with accrued seniority, and that would be consistent with the goal of encouraging conciliation of discrimination claims and mitigation of damages:

> The theory behind an offer of employment, whether under the NLRA or Title VII, is the same: a job comparable to the one denied the applicant — or from which the employee was fired or to which he was refused promotion — must be offered to him without any encumbering conditions that would force him to give up certain rights. The employee can then accept if he wishes and pursue back pay, seniority, or other rights he believes he was denied, through the courts or administrative agencies. Conversely, that offer does not need to include a surrender by the employer of his right to defend against such claims. If the employee rejects that unconditional offer, his right to back pay is cut off. Here, Gaddis and Starr rejected unconditional offers of the same jobs for which they had applied. Those offers did not need to — and did not — include a grant of back pay or retroactive seniority, but, on the other hand, were not conditioned on the surrender by Gaddis or Starr of their rights to pursue those claims.

> Indeed, the majority refers to Ford's "unconditional" offer, although it qualifies that by stating that an offer of seniority was a prerequisite. Therefore, the offers were valid and their rejection by Gaddis and Starr cut off back pay and reinstatement rights.

[A-104-06].

B. THE WEIGHT OF AUTHORITY IS AGAINST THE RULE ADOPTED BY THE MAJORITY BELOW.

The panel majority found support for its holding that employment discrimination claimants are not obligated to accept job offers that do not include retroactive seniority and back pay in the Third, Fifth, and Tenth Circuits. The Fifth Circuit decision is distinguishable,[16] and the Third Circuit decision was

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[16]In the Fifth Circuit case, *Claiborne v. Illinois Central R. R.*, 583 F.2d 143 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979), the defendant railroad maintained racially segregated job classifications. Some of the black claimants had accumulated substantial seniority in the "black" jobs. If they had accepted their employer's offer of a position in the more desirable, predominantly "white" classification, they would have been required to sacrifice that seniority. 583 F.2d at 151-53. Thus, to have obtained relief from the employer's discriminatory promotion practices, they would have been forced to suffer *further* effects of the discriminatory job classifications. In light of these facts, the Fifth Circuit chose not to apply a *per se* rule that rejection of the employer's job offer cut off back pay. *Id.* at 153.

In the present case, Ford's offer of a job to Gaddis and Starr did not require them to expose themselves to any further effects of a discriminatory employment policy. It is true that they would have lost whatever seniority each had accrued at General Motors, but that is hardly a circumstance for which Ford should be held responsible. Two Fourth Circuit cases also relied on by the court below, *United Transportation Union v. Norfolk & Western Railway*, 532 F.2d 336 (4th Cir. 1975), *cert. denied*, 425 U.S. 934 (1975), and *Hairston v. McLean Trucking Co.*, 520 F.2d 226 (4th Cir. 1975), are distinguishable for the same reason as is *Claiborne*. *UTU* and *Hairston* are discussed below at 27-28.

The court below was apparently led into its erroneous reliance on *Claiborne*, *UTU*, and *Hairston* by confusing the seniority the claimants in those cases had acquired with each defendant employer with the seniority that Gaddis and Starr, in this case, had acquired with *another* employer.

vacated and remanded by this Court, 414 U.S. 970 (1974), and therefore cannot be considered authoritative.[17] That leaves only the Tenth Circuit decision, *Comacho v. Colorado Electronic Technical College, Inc.*, 590 F.2d 887 (10th Cir. 1979.)[18]

The five other circuits that have addressed the issue and the National Labor Relations Board have chosen, instead, to follow the rule advocated by Judge Hoffman in the above quotation. Indeed, a prior panel of the Fourth Circuit, not discussed in the majority opinion in the present case, also followed that rule.[19]

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[17]The entire decision was vacated and remanded by this Court so that it could be reconsidered in light of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Edwin L. Wiegand Co. v. Jurinko*, 414 U.S. 970 (1973). The Third Circuit then remanded the case to the district court. *Jurinko v. Edwin L. Wiegand Co.*, 497 F.2d 403, 404 (3d Cir. 1974). The case again went to the Third Circuit upon appeal of the district court's decision. The Third Circuit remanded the case to the district court for a second time, with the observation, "It is true that when this case was first here we held that the plaintiffs should also recover for loss of earnings after they rejected that [offer not including seniority or back pay] and until Wiegand should reemploy them with seniority and back pay. But when the Supreme Court reviewed our decision and remanded the case to us it expressly vacated our ruling on damages." 528 F.2d 1214, 1216 (3d Cir. 1975). No further proceedings in the case are reported.

[18]There, the employer had offered to reinstate an employee whom it had illegally discharged on the basis of sex, but did not offer back pay. The employee rejected the offer. The Tenth Circuit concluded that the claimant's rejection of the offer was proper and that the back pay due her continued to accrue following the rejection. *But see National Labor Relations Board v. Betts Baking Company*, 428 F.2d 156 (10th Cir. 1970), (refusing to enforce the Board's award of back pay for the period subsequent to the expiration of an unconditional offer of reinstatement).

[19]Judge Hoffman urged in his dissent that the prior Fourth Circuit decision, *National Labor Relations Board v. Huntington Hospital, Inc.*, 550 F.2d 921 (4th Cir. 1977), governed the present case [A-96-97]. In *Huntington Hospital*, the employer hospital had discriminatorily discharged a worker for union activity. Soon thereafter, the hospital offered to reinstate the employee, but the offer was rejected. The Fourth Circuit held: "The Hospital, having once offered reinstatement, is released from the back pay obligation from the date the offer was rejected." 550 F.2d at 924. The court then proceeded to limit the award of back pay ordered by the Board "to the period between [the] discharge and [the] rejection of the offer of reinstatement." *Id.*

Numerous decisions of the National Labor Relations Board are directly contrary to *Jurinko*, *Comacho*, and the majority's holding below. Most recently, in *Consolidated Freightways*, 253 NLRB No. 137 (1981), the Board found explicitly that an employer's failure to include back pay in an otherwise valid offer of reinstatement does not render the offer ineffective for cutting off back pay:

> While a valid offer of reinstatement must be specific, unequivocal and unconditional, refusal to include accrued back pay in an otherwise valid offer of reinstatement does not render the offer inadequate. *The imposition of such a requirement would nullify the right to litigate the lawfulness of the discharge*.

253 NLRB at ____ (emphasis added).

The Board's decision in *Consolidated Freightways* drew on its earlier decision in *Moro Motors Ltd.*, 216 NLRB 192 (1975), in which the Board emphasized the claimant's obligation to raise any questions he had concerning the terms of the offer. In *Moro Motors*, the Board held that there was no obligation to offer back pay and also indicated that the seniority to be offered the claimant (a discharged employee in that case) was *previously-held* seniority, *not retroactive* seniority accruing from the date of discharge. It follows from *Moro Motors* that, since Gaddis and Starr obviously had no seniority with Ford at the time they applied, Ford had no obligation to make an award of retroactive seniority or back pay. [20] *See also National Screen Products Co.*, 216 NLRB 192 (1973); *Reliance Clay Products*, 105 NLRB 135 (1953).

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[20]Most of the cases cited in the text as conflicting with the Fourth Circuit's decisions involve offers to reinstate discriminatorily *discharged* employees. But, as the court of appeals implicitly acknowledged in relying on *Comacho*, which was a discharge case, the same principle governs discriminatory hiring cases. This Court has indicated the need for consistent treatment of these two classes of discrimination cases. *Franks v. Bowman Transportation Co.*, 424 U. S. at 768-69.

The First, Second, Seventh, Eighth, and Ninth Circuits are all in accord with the National Labor Relations Board. The Fourth Circuit's majority opinion does not discuss the line of cases from those circuits that conflicts with the Fourth Circuit's holding. For example, in *National Labor Relations Board v. Harrah's Club*, 403 F.2d 865 (9th Cir. 1968), the Ninth Circuit considered the back pay due an employee who had been the victim of a discriminatory layoff. The employee had rejected an offer of reinstatement on the ground that the offer made no mention of "unconditional reinstatement or back pay." *Id.* at 871. The Ninth Circuit held that the offer had been a valid one and had therefore cut off the accrual of back pay. *Id.* The conflict between *Harrah's Club* and the present case is particularly strong since Gaddis and Starr, unlike the claimant in *Harrah's Club*, failed even to *request* either seniority or back pay, indicating *other* reasons for rejecting the offer. Other Ninth Circuit cases, both before and after *Harrah's Club*, confirm the conflict between the Ninth and the Fourth Circuits. *See, e.g., Polynesian Cultural Center, Inc., v. National Labor Relations Board*, 582 F.2d 467, 475 (9th Cir. 1978); *Bon Hennings Logging Company v. National Labor Relations Board*, 308 F.2d 548, 555-58 (9th Cir. 1962); *National Labor Relations Board v. Ronney & Sons Mfg. Co.*, 206 F.2d 730 (9th Cir. 1953), *cert denied*, 346 U.S. 937 (1954).

The First Circuit also follows the rule that an employer's simple, unconditional offer of employment to a discriminatorily discharged employee cuts off back pay. *National Labor Relations Board v. Izzi*, 395 F.2d 241, 244-45 (1st Cir. 1968). In *Izzi*, the court set out in its opinion the terms of the offer of reinstatement. The offer, like Ford's offer to Gaddis and Starr, did not mention back pay or retroactive seniority, and it clearly did not require *waiver* of any claim for back pay or retroactive seniority. It was in this context that the court

stated: "Discriminatees, after being asked to return, had a clear way to mitigate damages." 395 F.2d at 245.

In accord with *Harrah's Club* and *Izzi* is the Eighth Circuit's decision in *National Labor Relations Board v. Midwest Hanger Co.*, 550 F.2d 1101 (8th Cir.), *cert. denied*, 434 U.S. 830 (1977). There, the Eighth Circuit held that an employer's job offer did not operate to cut off back pay because the offer was conditional in "other" respects. In so holding, however, the court observed:

> It is clear that had the Company's offer of reinstatement been conditioned solely on its refusal to give back pay, as the Company strenuously argues, then the offer of reinstatement would not have been invalidated.

550 F.2d at 1103-04. *See also Blakely v. Chrysler Corp.*, 407 F. Supp. 1227, 1230 (E.D. Mo. 1975) (finding that the claimant could have accepted the offer of reinstatement without having lost the right to pursue his claims as to back pay), *rev'd on other grounds sub. nom. Chrysler Corp. v. Mann*, 561 F.2d 1282 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978).

The Fourth Circuit's holding is also inconsistent with the Seventh Circuit's decision in *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), a Title VII case. There, plaintiff Waters established that he had not been recalled following a layoff because of a racially discriminatory agreement between his employer and his union. The Seventh Circuit determined that his back pay should be calculated as follows:

> It would appear from the record that but for the [discriminatory] agreement, Waters would have been recalled on January 17, 1967 . . . . Waters was tendered reemployment on September 5, 1967, which he declined to accept. In our judgment the

> discriminatory impact of defendants' June 1966 agreement ended with the tender made to Waters in September. The relevant period for computing damages therefore ranges from January 17, 1967 to September 5, 1967.

Id. at 1321. The Seventh Circuit nowhere suggests that the September 5 tender of reemployment, which the court approved, included any retroactive seniority or back pay. *See also Patterson v. Youngstown Sheet & Tube Co.*, 475 F. Supp. 344, 355 (N.D. Ind. 1979), *aff'd.* 659 F.2d 736 (7th Cir. 1981).

Similarly, in *Kenston Trucking Company, Inc. v. National Labor Relations Board*, 544 F.2d 1165, 1166-67 (2d Cir. 1976), the Second Circuit held that the employer's offer of a job to a discriminatorily discharged employee cut off back pay where there was no evidence that the offer was expressly conditioned on settling the claimant's back pay claim. There is no intimation that the offer should have *included* back pay or retroactive seniority.

The weight of authority, then, is strongly against the Fourth Circuit's rule that a discrimination claimant may reject an unconditional job offer that does not include retroactive seniority and back pay without losing any entitlement to subsequently accruing back pay. The NLRB and the majority of the circuits that have considered the issue have held that an unconditional job offer cuts off further back pay liability because that holding effectuates the statutory objectives of encouraging conciliation of discrimination claims and mitigation of damages while benefitting everyone involved: the discrimination claimant gets the job he or she wants and retains the right to pursue the further relief of back pay and retroactive seniority; the employer fills a job opening and succeeds in cutting off its back pay liability without waiving its right to contest the claimant's allegation of illegal discrimination; and

present employees with accrued seniority have the assurance that their employers will not be encouraged to undermine their seniority rights by giving retroactive seniority to discrimination claimants in the absence of a disinterested, judicial finding of liability.

The Fourth Circuit's majority opinion makes no attempt to distinguish or discredit the cases, discussed above, that are contrary to the rule the Fourth Circuit chooses to adopt; nor does the majority opinion answer the concerns, raised by Judge Hoffman in his dissent and discussed above, that the court's holding will work against important federal policies. Instead, the court of appeals relies on two of its own prior decisions that held "... under Title VII victims of discrimination need not accept job offers which include a loss of seniority in order to preserve their back pay rights." [A-33].

In both of those cases, *United Transportation Union v. Norfolk & Western Railway*, 532 F.2d 336 (4th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), and *Hairston v. McLean Trucking Co.*, 520 F.2d 226 (4th Cir. 1975), the employer's job classifications segregated employees by race. The claimants were black employees who had held predominantly "black" jobs. The employers in both cases argued that their back pay liability should be cut off as of the date the claimants rejected the employers' offers to promote them to predominantly "white" jobs. The claimants had rejected the promotion offers since the employers in both cases would have required them to sacrifice the seniority they had acquired in the "black" jobs. Both decisions held that the refusal to accept the "white" jobs did not cut off the claimants' back pay because the employers' requirement that they lose seniority by transferring was *itself* a discriminatory practice, fully within their employers' control. In *Hairston*, the Fourth Circuit said that back pay is to be cut off "only if the refusal [of an offer of transfer] was a free and voluntary act on the part of the employee, not

constrained by any *discriminatory employer practice or policy*. . . ." 520 F.2d at 232 (emphasis added). A refusal to be transferred would not cut off back pay if motivated by a claimant's reasonable reluctance to expose himself to *another aspect* of an *employer's discriminatory employment policy*, as for example, a *discriminatory loss of seniority*. . . ." *Id.* (emphasis added).

Here, however, the claimants' acceptance of Ford's offer of employment would *not* have exposed them to "another aspect of [their] employer's discriminatory employment policy." Gaddis and Starr would have lost their General Motors seniority, of course, but, unlike the claimants in *UTU* and *Hairston*, they would not have forfeited any rights accrued through employment with the discriminating employer. The loss of seniority acquired at General Motors is not a circumstance that should obligate Ford to include seniority in its offer, just as a possible loss of other benefits at General Motors should not obligate Ford to offer the claimants those benefits.

The Fourth Circuit's attempt to attribute significance to the claimants' testimony that they rejected Ford's offers to avoid losing General Motors seniority overlooks the absence of evidence that they ever mentioned that concern to anyone at Ford. Thus, Ford can hardly be faulted for failing to offer to compensate them for that loss. In addition, the majority, in rejecting Ford's argument that the claimants' *acceptance* of the General Motors jobs terminated the accrual of back pay, reasoned that the GM jobs were only "temporary." [A-26]. The characterization of the jobs as "temporary" is inconsistent with the notion that the loss of the seniority the claimants had accrued in those jobs is a matter that should be of crucial significance in the court's evaluation of Ford's job offer.

Ford submits that the Fourth Circuit's holding that back pay due an employment discrimination claimant continues to accrue after the claimant has rejected an unconditional offer that does not include retroactive seniority or back pay is not warranted by Title VII or the policies underlying it and is contrary to the weight and reason of authority. Acceptance of the Fourth Circuit's holding in this case would have a grave, negative effect on the handling of employment discrimination claims and would thus undermine a central policy of Title VII. For these reasons, this Court should reverse the Fourth Circuit and hold that Ford's unconditional job offers to Gaddis and Starr terminated its back pay liability.

II. The Fourth Circuit Erred in Holding that Ford Had the Burden of Proving Its Legitimate, Non-discriminatory Reasons for Its Hiring Decisions.

A. THE FOURTH CIRCUIT IMPOSED ON FORD A BURDEN OF PROOF EXPRESSLY REJECTED BY THIS COURT IN *TEXAS DEPT. OF COMMUNITY AFFAIRS V. BURDINE*, ___ U.S. ___, 101 S. CT. 1089 (1981).

The Fourth Circuit, in approving findings that Ford had illegally discriminated against Gaddis, Starr, and Smith, employed an analysis that is directly contrary to this Court's statement of the law in *Texas Dept. of Community Affairs v. Burdine*, ___ U. S. ___, 101 S. Ct. 1089 (1981). *Burdine*, the most recent in the line of Supreme Court cases explaining the scheme of proof applicable to Title VII cases involving claims of discriminatory treatment,[21] summarized the three

[21] *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

stages in the proof of such claims: the claimant must prove by a preponderance of the evidence a prima facie case of discrimination; if the claimant proves the prima facie case, the employer has the burden to "articulate some legitimate nondiscriminatory reason" for rejecting the claimant; once the employer articulates such a reason, the claimant then has the burden to prove by a preponderance of the evidence "that the legitimate reasons offered" by the employer were but a pretext for discrimination. ___ U.S. at ___, 101 S. Ct. at 1093.

The *Burdine* decision focused particularly on the requirements for the employer's response to a prima facie case:

> The burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proferred reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.

___ U.S. at ___, 101 S. Ct. at 1094 (citations omitted). The Court emphasized that the burden on the defendant is not one of "proof or persuasion," but only of "production." ___ U.S. at ___, 101 S. Ct. at 1095-96.

But the Fourth Circuit's evaluation of Ford's reasons for failing to hire the women proceeded from a different premise:

> Once EEOC proved this prima facie case, *Ford had the burden of proving a legitimate, nondiscriminatory reason* for hiring the three men instead of Gaddis, Starr and Smith.

[A-14] (emphasis added). This statement of governing legal principles serves as the framework for the court's immediately succeeding analysis of the issue whether Ford had rebutted the claimants' prima facie cases. Because the framework for the court's analysis was improperly constructed, the conclusion that Ford had failed to rebut the prima facie cases is unsound.

Ford's explanations for its decisions affecting Gaddis, Starr and Smith, summarized below, certainly met *Burdine*'s requirement that they be admitted into evidence at trial; moreover, those explanations were, in large measure, confirmed as facts by the trial court in its findings. Nevertheless, the district court found, and the court of appeals affirmed, that Ford had not succeeded in rebutting the claimant's prima facie cases.

Because the court below analyzed Gaddis' and Starr's cases separately from Smith's, Ford will separate its discussion of the cases accordingly.

B. Ford Adequately Articulated a Legitimate Reason for Its Failure to Hire Gaddis and Starr.

In "articulating" its reasons for failing to hire Gaddis and Starr, Ford introduced into evidence the testimony of Frank Miller, the warehouse manager who had made the contested decisions. Miller explained that the hiring procedure he followed was to review applications in the chronological order in which they were filed, concluding the process once he had identified a sufficient number of qualified applicants. Three male applicants for warehouse work, Blanchard, Coe and Rogers, had applied before either Gaddis or Starr, and each of those males had prior experience in warehouse operations.[22] Because he followed the hiring procedure outlined in his testi-

[22]The warehouse manager's testimony establishes that all three of these males were prior, qualified applicants, and the district court's findings reflect an acceptance of this testimony [A-158-59]. The district court's findings include an implicit assumption, to which Ford accedes, that Blanchard and Coe were the two males who were hired instead of Gaddis and Starr, and the court of appeals' analysis proceeds from that same assumption.

mony, Miller had no occasion to review the later applications of Gaddis and Starr for the positions in question:

[244] Q. Mr. Miller, as I understand your testimony on direct, you were responsible for hiring for the warehouse. Is that correct?

A. Yes, sir.

Q. And you, in trying to follow the procedures, as I understood your testimony, have interviewed people only when you were hiring, as a rule. Is that correct?

A. That's correct.

Q. And I believe you testified on direct that applications were filed at the front, subsequently sent to you where they were filed in your drawer, and you reviewed the applications when openings occurred by going to the oldest applications first, within a six months period, coming forward, and reviewing [245] those applications you determined who was qualified, called them in for interviews, and then you hired them.

A. I only reviewed the applications up to the point where I had sufficient qualified people.

Q. Does that mean to say that when you had a six months backlog of applications, you didn't review everyone of those applications before you called in two people for one opening or one person?

A. That's absolutely correct.

Q. What did you do in fact?

A. I reviewed the applications, and when I had a sufficient number of people who appeared to have qualifications, I would call them in for interviews. If the people I called in were, if I

decided to hire them or offer them employment, I didn't go to any more applications.

Q. Specifically, Mr. Miller, in the case of Mr. Rogers, Mr. Coe and Mr. Blanchard, did you apply that system?

A. Absolutely.

Q. And did you pull out their applications from the lower part of your pile, I take it, as the earlier applications, and did you determine them to be basically qualified, and then determine whether they were in fact qualified with a subsequent interview?

A. Yes, sir, I did.

Q. Did you specifically, when you hired those three, com-
[246] pare those applications with the applications of one Ms. Gaddis and one Ms. Starr?

A. I would not have had occasion to. No, I did not.

Q. When they were determined to be the people you would hire, they weren't in fact compared with Ms. Gaddis and Ms. Starr?

A. No, sir.

Q. It's true, nevertheless, isn't it, that those applications of Mr. Blanchard, Mr. Coe and Mr. Rogers preceded the applications of Ms. Gaddis and Ms. Starr date-wise?

A. That is correct.

Q. I believe you testified on direct that comparing the experience of those three men, one had 22 months of similar experience, one had 11 months of GM experience, and one was an experienced Ford Parts man from a Ford dealer. Is that correct?

A. That's correct.

Q. I believe I recall your telling Mr. Hunter that the experience related on Ms. Gaddis' and Ms. Starr's applications was something like 10 months on the outside, which you understood to be interrupted by some layoffs in between, so something less than 10 months experience in their case.

A. That is correct.

Q. In truth, as I understand it, you did not make any judgment of those three versus those two.

A. I did not compare the three with the two.

* * *

[JA 35-37].

This explanation of Ford's failure to hire the women was, in Ford's view, at least an "articulation" sufficient to rebut the prima facie cases of Gaddis and Starr. Moreover, the district court explicitly found that Blanchard and Coe applied before either Gaddis or Starr, and the findings further reveal that the two men certainly had the type of experience the district court relied upon to find the women qualified [A-158-59].[23] Nevertheless, the district court did not regard Ford's evidence that it had legitimately hired Blanchard and Coe because they were prior, qualified applicants as being an adequate rebuttal of the claimants' prima facie cases.

The district court's ruling is based on the erroneous assumption that the burden on the defendant employer in the "rebuttal" stage is identical to the burden on the plaintiff in the "prima facie case" stage. The district court's finding about the inadequacy of Ford's rebuttal identifies both burdens as burdens to "establish," stating that all of the elements of the claimants'

[23]In its opening brief to the Fourth Circuit, Ford pointed out that even though the record was ambiguous whether Ford communicated its offers to the males before the women applied, the record was unmistakably clear that the decisions to hire the males were made without the benefit of or comparison with the claimants' applications [Ford Brief at 16].

prima facie cases "have been established" and that Ford had "not establish[ed] a legitimate, nondiscriminatory reason for its failure to hire the three women in August, 1971." [A-167-68]. Given the explanation Ford introduced at trial, it was error for the trial court to hold that Ford had not succeeded in rebutting the claimants' prima facie cases. The trial court's equation of the employer's burden with the claimant's burden reveals that the holding springs from the court's placing a heavier burden on the employer than *Burdine* permits.

The Fourth Circuit's decision, like the district court's, is founded upon a supposition that Ford's evidence was inadequate to rebut the prima facie cases of the claimants. The court of appeals expressly identified the rebuttal stage as the point at which Ford lost the case, observing that "Ford was left with no defense to the prima facie case of discrimination" [A-21-22, n. 5] when it failed to convince the district court of the truth of Ford's explanation.[24] Moreover, neither the district court nor

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[24]The Fourth Circuit's rejection of Ford's argument concerning the burden of proof is based on an analysis like that the Eighth Circuit employed in *Vaughn v. Westinghouse Elec. Corp.*, 620 F.2d 655 (8th Cir. 1980), *vacated and remanded*, ____ *U.S.* ____ (1981). In *Vaughn*, the Court of Appeals affirmed a finding of discrimination, noting that the employer's evidence of the claimant's poor production record had failed to "articulate" an explanation adequate to rebut the plaintiff's prima facie case because poor production, in the face of opposing evidence, was not established by a preponderance of the evidence. 620 F.2d at 660. In the present case, the Fourth Circuit, addressing the issue whether the males were actually offered jobs before the women applied, affirmed Ford's liability in reliance upon the district court's discrediting Ford's version of the evidence as to "timing"; thus the Fourth Circuit, like the Eighth, assumed the employer had not succeeded in "articulating" its explanation because it did not *prove* the explanation [A-22 n. 5].

This Court vacated the Eighth Circuit's decision in *Vaughn*, and remanded the case for reconsideration in light of *Burdine*, ____ U.S. at ____. Ford submits that this Court should treat similarly the Fourth Circuit's decision here. By Ford's evidence that the males were offered the contested jobs before the women applied [JA 38, 69], Ford may well have articulated a legitimate reason for its decisions and thereby have rebutted any presumption of discrimination. In any event, Ford maintains that there can be no doubt that its undisputed evidence that it selected prior, qualified applicants is an adequate articulation. Accordingly, after Ford's proof, Gaddis and Starr were left with no presumption of intentional discrimination.

the court of appeals found that Ford's liability rested on any proof that its explanations were a pretext for discrimination.[25]

Accordingly, the court of appeals examined the rebuttal stage of the case, beginning its analysis with the statement that "Ford had the burden of proving" its rebuttal [A-14]. The Court then discussed two elements of Ford's proof, rejecting both as inadequate to meet that burden.

First, the Fourth Circuit considered Ford's evidence at trial that Blanchard and Coe had actually been offered their jobs before Gaddis or Starr applied. As Ford conceded, the record on that point was ambiguous. After discussing the evidence at some length, the court of appeals concluded that the district court had not erred in finding that Blanchard and Coe had been *offered* their jobs after Gaddis and Starr applied [A-16].

Then the court of appeals turned to the evidence that Ford had introduced about the related work experience that Blanchard and Coe had indicated on their applications. Ford had introduced that evidence as part of its explanation that it had

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[25]Although there was no finding of pretext, the EEOC's brief in opposition to Ford's petition for a writ suggests that Ford's explanations "were shown to be pretextual." [EEOC Brief at 6]. The absence of any such finding itself suffices to show that pretext played no role in the decision of either the district court or the court of appeals. Rule 52(a) of the Federal Rules of Civil Procedure requires that in all civil actions tried without a jury "the court shall find the facts specially . . . ." The district court's findings " 'must be expressed with sufficient particularity to allow [the Court of Appeals] to determine rather than speculate that the law has been correctly applied.'" *Curtis v. Commissioner of Internal Revenue*, 623 F.2d 1047, 105 (5th Cir. 1980) (*quoting Hydrospace-Challenger, Inc. v. Tracor/MAS, Inc.*, 520 F.2d 1030, 1034 (5th Cir. 1975)); *See also, Simon v. Honeywell, Inc.*, 642 F.2d 754, 755-56 (5th Cir. 1981).

If this Court holds, as Ford submits it should, that Ford's evidence *did* satisfy its rebuttal obligation, the verdicts in favor of the claimants should be vacated and the case remanded for proceedings in which the proper burden of proof will be applied to the parties' evidence and findings that are appropriate in light of that burden will be entered. *See Bundy v. Jackson*, 641 F.2d 934, 950 (D.C. Cir. 1981), *relying on McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973).

legitimately chosen Blanchard and Coe without comparing them to Gaddis and Starr because the males were qualified and because their applications were prior in time. The court of appeals, however, interpreted Ford's evidence concerning the experience of Blanchard and Coe as an attempt to show that they had been *chosen* because they were *more qualified* than Gaddis or Starr. The court then analyzed what it perceived to be Ford's explanation of its hiring decisions, again in accordance with its stated assumption that Ford's rebuttal burden was one of "proof":

> The district court found that Gaddis and Starr were qualified to work for Ford as picker-packers, and on this record *it is certainly not clear that Blanchard and Coe were more qualified.*

[A-17, n.3] (emphasis added). Ford submits that such a requirement cannot stand after this Court's holding in *Burdine:*

> The Court of Appeals . . . erred in requiring the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff. . . . Title VII does not demand that an employer give preferential treatment to minorities or women.

___ U.S. at ___, 101 S. Ct. at 1096 (citations omitted).

After comparing the qualifications of Gaddis, Starr, Blanchard, and Coe, and concluding that Ford had failed to establish that the males had superior qualifications, the court of appeals then observed that Ford could not rely on a "relative qualifications" defense because "it never evaluated the qualifications of the women." [A-17-18, n.3]. Neither part of the court of appeals' analysis of Ford's evidence concerning qualifications of Gaddis, Starr, Blanchard, and Coe is truly pertinent. The court's analysis assumes, incorrectly, that Ford

intended to present a defense hinging on relative qualifications and ignores Ford's undisputed explanation that Miller, after reviewing the prior-in-time applications of Blanchard and Coe and identifying them as qualified, had not needed to continue his chronological review to the point of reaching the application of Gaddis or Starr.[26] The explanation that the court failed to discuss was all that was necessary to show that Ford had not chosen the men for discriminatory reasons.

Ford submits that the courts of appeals' analysis of Ford's evidence about the related work experience of Blanchard and Coe is erroneous in at least two respects. First, the court apparently misconceived Ford's explanation of its hiring decisions, never focusing on Ford's evidence that it had chosen Blanchard and Coe as prior, qualified applicants. Second, the court's analysis of this evidence, like its analysis of the evidence concerning the timing of the job offers, is erroneous on its face since it impermissibly imposed on Ford the burden of proving its rebuttal evidence. Ford submits that the court's failure to discuss a crucial part of Ford's rebuttal evidence may also signal the application of that improper burden; that is, in upholding the finding that Ford is liable to Gaddis and Starr, the court implicitly indicated that *none* of Ford's evidence amounted to an adequate rebuttal of Gaddis' and Starr's prima facie cases. Ford contends, however, that its evidence concerning Blanchard and Coe was certainly an adequate expla-

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[26] Ford acknowledges that the warehouse manager compared the qualifications of Blanchard, Coe, Gaddis, and Starr *at trial* and concluded that the applications of Blanchard and Coe revealed them to have somewhat greater experience than either of the two women. Ford introduced that testimony because it underscored the legitimacy of Ford's determination that Blanchard and Coe were fully qualified. Indeed, even had he reached Gaddis' and Starr's applications and compared them to those of Blanchard and Coe, the warehouse manager might well have chosen the males because of their experience and their priority in applying.

nation of its hiring decisions since it amounted at least to an "articulation" of legitimate reasons for Ford's failure to hire Gaddis and Starr.

Alternatively, the court erred in failing to evaluate at all Ford's evidence that it had hired Blanchard and Coe because they were prior, qualified applicants. Whatever the nature of the court's error in omitting discussion of that evidence, it is clear that the omission was, indeed, erroneous and that the court's affirmance of the finding for Gaddis and Starr should be reversed.

C. FORD ADEQUATELY ARTICULATED A LEGITIMATE REASON FOR ITS FAILURE TO HIRE SMITH.

The Fourth Circuit's statement that Ford had the burden of proving its nondiscriminatory reasons for its employment decisions expressly embraces Smith, as well as Gaddis and Starr [A-14]. The court's analysis confirms that it applied the erroneous standard to Smith, as well as to Gaddis and Starr.

Ford showed its legitimate reason for failing to hire Smith by eliciting from her, on cross-examination, that it was unclear what job, if any, she had applied for at Ford in 1971 [JA 59].[27] As Judge Hoffman urged in his dissent on this issue, Ford thus explained that it could not reasonably be expected to have known that Smith was applying for a warehouse job [A-126-27]. That explanation was clearly adequate, under the *Burdine* standard, to rebut Smith's prima facie case if, in fact, she ever proved a prima facie case. Also, as Judge Hoffman noted, Smith failed to introduce any evidence tending to show that Ford's explanation was somehow pretextual, and, indeed, no pretext was found [A-126-27; see also n. 25, above]. Thus, it

[27]No 1971 job application for Smith could be found, so the only evidence about whether Smith applied for a job with Ford in 1971 and what job she had then applied for was her testimony at trial. See p. 6, above, and n. 6. Even the court of appeals majority acknowledged that testimony was "not a model of clarity." [A-20, n. 4]. As Judge Hoffman noted in his dissent, "In light of the record, this is a mild expression." [A-118].

is evident that the Fourth Circuit's affirmance of the district court's finding in favor of Smith is a consequence of the court's erroneous assumption that Ford had the burden of *proving* its explanation. Since the court of appeals' imposition of this burden on Ford is directly contrary to this court's holding in *Burdine*, the affirmance of the award to Smith should be vacated.

CONCLUSION

Because the Fourth Circuit applied an erroneous legal standard in evaluating Ford's reasons for not hiring the claimants, Ford was improperly denied a rebuttal of the prima facie cases. Ford asks this Court to vacate the judgments and to remand this case for further proceedings so that Ford's defense can be evaluated under the principles stated in *Burdine* and its predecessor cases.

Ford also asks this Court to hold that any back pay liability to Gaddis and Starr terminated with the unconditional offers Ford extended to them. For the reasons set out above, that holding is consistent with the weight of authority and will best serve the federal policy of encouraging equitable, voluntary handling of employment discrimination claims.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1981

FORD MOTOR COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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QUESTIONS PRESENTED

1. Whether an employer who unlawfully refused to hire job applicants because they were women can terminate its liability for back pay by subsequently offering the applicants positions without seniority at a time when they had obtained, and accumulated seniority in, other jobs.

2. Whether the courts below placed an improper burden of proof on petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-300

FORD MOTOR COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-4 to A-149) is reported at 645 F.2d 183. The district court's findings of fact and conclusions of law (Pet. App. A-152 to A-173) are unofficially reported at 19 Fair Empl. Prac. Cas. (BNA) 1288.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1981. A petition for rehearing was denied on May 18, 1981 (Pet. App. A-3). The petition for a writ of certiorari was filed on August 14, 1981, and granted on November 9, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

In July 1975, the Equal Employment Opportunity Commission brought this employment discrimination suit against petitioner Ford Motor Company in the United States District Court for the Western District of North Carolina. The Commission alleged that Ford's automotive parts warehouse in Charlotte, North Carolina, refused to hire women because of their sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Commission sought back pay for the victims of Ford's discrimination and injunctive relief (App. 3-6).[1]

The district court found, and the court of appeals agreed, that petitioner discriminated against women both in 1971 and in 1973. In this Court, petitioner challenges only certain holdings pertaining to its failure to hire three women—Judy Gaddis, Rebecca Starr, and Zettie Smith—in 1971.

1. Smith applied for a job at Ford's Charlotte warehouse in April and again in June of 1971 (App. 56, 58; Pet. App. A-17, A-157). Gaddis and Starr applied on July 21, 1971 (Pet. App. A-6, A-7, A-15, A-159). Gaddis and Starr had recently been laid off from a General Motors warehouse, where each had 10 months' experience at jobs equivalent to those they sought from petitioner (*id.* at A-159). Smith had comparable prior experience (*id.* at A-157). There appears to be no dispute that all three women were qualified for positions in the warehouse (*id.* at A-158, A-159).

At the time the women applied, petitioner had never employed a woman at its Charlotte warehouse (Pet.

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[1] "App." refers to the Joint Appendix filed in this Court. "J.A." refers to the Joint Appendix filed in the court of appeals.

App. A-21; App. 30, 70). The district court found, and Ford now appears to concede, that the applications of the three women were never considered (Pet. App. A-153; see Pet. Br. 34 n.23), even though there were vacancies at the warehouse at the time they applied (Pet. App. A-160). Instead, three men were hired to fill the positions for which Gaddis, Starr, and Smith had applied. Two of the men had just graduated from high school and had no prior experience in any automotive parts warehouse. The third man had worked with Gaddis and Starr in the General Motors warehouse before being laid off (*id.* at A-158 to A-159; J.A. 693, 702).

Ford's defense at trial was that the women applied only after the men were hired to fill the vacancies (Pet. App. A-14, A-17); Ford's warehouse manager, who made the hiring decisions (*id.* at A-157; App. 35), so testified (App. 30, 37-38). The district court expressly found that, on the contrary, Smith applied before any of the three vacancies were filled and Gaddis and Starr applied when at least two positions remained open (Pet. App. A-157 to A-158, A-160). The district court based its findings on the testimony of the men who were hired and on employment records kept by petitioner (see *id.* at A-15 to A-16, A-159 to A-160). The court of appeals, after reviewing the conflicting evidence, upheld the district court's findings, noting that they were based on credibility determinations (*id.* at A-16, A-19).

The district court also considered other evidence suggesting that petitioner's hiring practices were discriminatory. For example, the district court found that a Ford receptionist told Gaddis and Starr that Ford did not hire women to work in the warehouse (Pet. App. A-159). The warehouse manager testified

that for several months he refused Gaddis's repeated requests for an interview because "I just have too much work to do to sit down and interview people if I'm not hiring" (App. 31); but a male applicant was interviewed as soon as he applied, even though there were no vacancies at the time (App. 38, 60). The manager made other statements that would lend support to an inference that he intended to hire no women.[2] Finally, the district court found that petitioner's criteria for hiring at the warehouse were variable and "very subjective," giving weight to factors that could easily permit discrimination—an applicant's "'promotability,'" his "'general demeanor,'" and "how an applicant will 'fit in'" (Pet. App. A-155 to A-156).

2. In January 1973, Gaddis and Starr were recalled to their General Motors jobs (Pet. App. A-24, A-163). In the afternoon of July 26, 1973, petitioner wired Gaddis, offering her a job and telling her to report for work on July 30 (App. 15-18, 20). Petitioner's warehouse manager acknowledged that this offer was made because Gaddis had filed charges with

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[2] The manager testified that he was "astounded that two nice looking, well-dressed young ladies would apply for a warehouse job" (App. 71-72). He also testified that he had told Gaddis and Starr (App. 72):

> [T]hey would be very much in the same circumstances as Jackie Robinson was when he broke the color barrier in baseball. You are going into brand new ground * * *. It's an industrial atmosphere. There are lift trucks running, conveyors. You're going into an area where men use rough language, and a very distinct possibility where there are men and two attractive young ladies working in there, they may very well have been subjected to passes, offensive remarks, off-color language, what we call shop talk.

the Commission (App. 17, 20; Pet. App. A-162 to A-163). The morning after she received the offer Gaddis telephoned Ford to ask about the nature and hours of the job she was offered; according to the warehouse manager's testimony, she talked only to a clerk and was told that "management was not sure what her regular duties would be" or what her regular hours would be, but that if she did not accept the job by 9:30 a.m. on July 30 it would be offered to another person (App. 21; J.A. 733). On July 31, Ford offered the job to Starr (App. 24, 64-65). She telephoned the warehouse to request a meeting among the manager, Gaddis, and herself; she was told that the manager was unavailable (App. 24, 65). Gaddis and Starr then visited the warehouse to inquire about the jobs but were met only by the clerk, who was "vague" and uninformative (App. 43, 54).

Both Gaddis and Starr declined the offers. Gaddis testified (App. 43, 47): "At that time, I had a good seniority with General Motors and I had a secure job, so on those grounds, I refused it. * * * I had seniority and I knew that I wasn't in danger of any layoff, where if I had accepted the job at Ford I might have worked a week or two weeks and been laid off because I would have been low seniority." Starr testified (App. 54; J.A. 657-658): "[A]t General Motors I had * * * fourteen or fifteen people under me. I had seniority * * *. I wanted to look into the job. Yet, I had a fear * * * I could go work at Ford and work a week and I knew that they could lay me off." The district court found that Gaddis and Starr declined the offer because "[n]either woman wished to lose accrued seniority at General Motors, and neither wanted to be the only woman employed in the Ford warehouse" (Pet. App. A-163).

The men whom Ford hired in 1971 for the jobs it denied to Gaddis and Starr remained employed at the warehouse at least until the time of the trial in 1977 (Pet. App. A-27; J.A. 224-228). Gaddis and Starr lost their jobs at General Motors when its Charlotte warehouse closed in 1974 (Pet. App. A-24; J.A. 658, 1162-1163). They sought further employment unsuccessfully until September 1975, when they entered a government training program for the unemployed (*id.* at A-40, A-42).[3]

The district court ruled that the back pay award should be "the difference between the amount [the women] would have earned had they been hired in * * * 1971, and the amounts actually earned or reasonably earnable by them" between that date and the date of the district court's order (Pet. App. A-169 to A-170). The district court rejected Ford's contention that Gaddis and Starr should be awarded no back pay for any period after the dates on which they declined Ford's offer of employment (*id.* at A-170 to A-171). The district court also rejected Ford's contentions that the back pay awards should be reduced by the amount of unemployment compensation the women had received; that the awards should have been cut off entirely when Gaddis and Starr were recalled by General Motors; and that the awards should have been cut off when Gaddis and Starr entered the government training program (see *id.* at A-24, A-169, A-171 to A-172; App. 81-82).[4]

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[3] As a result of her training in this program, Gaddis found a job as a licensed practical nurse in September 1976. Starr has been employed as a missionary since November 1975. See J.A. 229-230.

[4] The court of appeals affirmed the district court's rulings on these points (Pet. App. A-23 to A-32, A-40 to A-52) and Ford does not challenge them in this Court.

3. The court of appeals affirmed the district court's conclusion that petitioner refused to hire Gaddis, Starr, and Smith because they were women (Pet. App. A-12 to A-21).[5] The court also affirmed, over a dissent, the district court's holding that Gaddis's and Starr's rights to back pay were not cut off by their refusal of petitioner's July, 1973 offer.[6] The reason, the court of appeals said, was that "Ford's offer did not include retroactive seniority to the time of the 1971 hirings. Ford presented Gaddis and Starr with an offer of mere beginning employment" (*id.* at A-33). But "[b]y accepting a job with Ford and leaving General Motors, Gaddis and Starr would have forfeited all their rights at General Motors" (*ibid.*). Therefore, the court of appeals explained (*id.* at A-34):

> Ford would present Gaddis and Starr with a[n] * * * intolerable choice. Under Ford's legal theory, if Gaddis and Starr rejected Ford's offer and stayed at General Motors, they would forego their rights to further back pay benefits. On the other hand, if they accepted the job offered by

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[5] With respect to Gaddis and Starr, this holding was unanimous (see Pet. App. A-79 to A-81). District Judge Hoffman, sitting by designation, disagreed with the district court's finding that Smith had applied for a warehouse job in 1971 and would have remanded for a further evidentiary hearing on that point (*id.* at A-127 to A-128).

[6] Judge Hoffman dissented principally because "[*t*]*he discussions between Ford and the two women at the time the offers were made involved no consideration of back pay or seniority rights*" (Pet. App. A-88; emphasis in original) and because "I hazard the assumption that an offer of retroactive seniority rights * * * would have been in direct violation of [Ford's collective bargaining] agreement" (*id.* at A-92).

> Ford, which they had not held for the previous two years because of Ford's discriminatory hiring policy, they would lose their seniority rights at General Motors.

The court concluded that "the district court reached an eminently reasonable result. It did not permit Ford to cut off the back pay period by making Gaddis and Starr an incomplete and unacceptable offer, and it denied Gaddis and Starr a double recovery by deducting their General Motors wages from their back pay awards" (*id.* at A-39 to A-40).

Petitioner now challenges this aspect of the back pay award to Gaddis and Starr, as well as the finding that it discriminated against Gaddis, Starr, and Smith.

SUMMARY OF ARGUMENT

I. Even though it is a central policy of Title VII to award full and complete back pay relief to victims of discrimination, petitioner asserts that the court of appeals erred by not cutting off Gaddis's and Starr's back pay awards at the date of the July 1973 offers.

A. Petitioner relies chiefly on a principle, developed under the National Labor Relations Act, that an employer is generally not liable for back pay accruing after the point at which it unconditionally offers full reinstatement to the wronged employee. It has never been established that this principle applies to Title VII back pay awards, but we will assume arguendo that it does. An employer has not offered reinstatement, however, unless it offers to place the employee in the position he would have been in but for the employer's discrimination. If Ford had not discriminated against Gaddis and Starr, they would

have had two years' seniority with Ford in July 1973. Because Ford's offer did not include that seniority, it was not an offer of full reinstatement and therefore did not toll the back pay award.

The reason for the NLRA principle that an offer of reinstatement tolls a back pay award is that if an employer ensures that a claimant will suffer no further injury as a result of the alleged unlawful act, the employer's back pay liability should no longer accrue. But petitioner's July 1973 offer would not have prevented further injury to Gaddis and Starr. On the contrary, solely because of Ford's discrimination, Gaddis and Starr would have continued to be at a seniority disadvantage that would have affected their job security and opportunities, health and unemployment insurance, and other terms and conditions of employment. If the wages or other benefits of Ford's warehouse job had increased between 1971 and 1973, it is clear under NLRA precedents and the logic of the NLRA principle that Ford could not have tolled its back pay liability by offering a position at the 1971 rates; Ford's offer to Gaddis and Starr of a position without the seniority they would have earned is no different. Because that offer did not terminate the impact of Ford's unlawful act, there is no reason for it to have terminated Ford's liability.

Petitioner is correct in saying that an employer need not also offer accrued back pay, along with reinstatement, in order to toll a back pay award; in order to avoid future liability, the employer need only ensure that there will be no future injury. It need not also remedy past injuries. But, contrary to petitioner, there is no suggestion in the court of appeals' opinion that Ford's July 1973 offers were deficient because they failed to include back pay.

B. Petitioner also asserts that Gaddis's and Starr's refusals to accept its July 1973 offers were failures to mitigate damages that should reduce the back pay awards. The burden was on petitioner to show a failure to mitigate damages; Gaddis and Starr were obligated only to make reasonable efforts to do so. Whether a claimant acted reasonably is, necessarily, an issue primarily committed to the district court, subject to review by the court of appeals.

Here there is no reason whatever to question the lower courts' determination that Gaddis and Starr acted reasonably. Gaddis and Starr would have had to give up the seniority they earned at General Motors (and were unlawfully denied an opportunity to earn at Ford) in order to accept petitioner's July 1973 offer; a claimant need not bear such burdens in order to mitigate damages, especially in view of the special solicitude for seniority rights shown by the drafters of Title VII. The purpose of the requirement that damages be mitigated is to encourage claimants to work while their claims are being adjudicated, and Gaddis and Starr had sought and obtained employment and were working when they declined petitioner's offer. Finally, under the NLRA, an employee's duty to mitigate damages generally does not obligate him to accept an offer of less than full reinstatement from the employer who discriminated against him.

C. Petitioner contends that the court of appeals' approach will interfere with the seniority rights of incumbent employees and cause violations of collective bargaining agreements. In fact, petitioner's approach—by giving employers every incentive to delay an unconditional grant of seniority rights until it is ordered by a court—would have a far more devastat-

ing effect on incumbents' seniority rights than the court of appeals' approach; the court of appeals' rule encourages employers to grant seniority credits promptly to victims of discrimination, before incumbents' rights have accrued to a great extent. Moreover, petitioner, like other employers, is free to negotiate a collective bargaining agreement that permits it to award seniority credits to likely victims of discrimination. If it has chosen not to do so, it is in the same position as any other defendant whose ability favorably to affect its litigating position or to reduce its potential liability is restricted by a contract it has voluntarily entered with a third party.

There is no basis for petitioner's assertions that the court of appeals' approach will discourage the voluntary settlement of Title VII claims. The question in this case is when an unconditional offer—not a settlement offer—serves to terminate back pay liability irrespective of the claimant's response. There is no reason to believe that giving an employer a greater ability unilaterally to terminate its liability in this way would make settlements more likely; and even if it would, that is not a sufficient reason to adopt an otherwise unjustified rule.

II. Petitioner also asserts that the courts below, in contravention of *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), required it not just to "articulate" but to "prove" a legitimate reason for its failure to hire Gaddis, Starr, and Smith. The court of appeals, however, specifically addressed the question whether petitioner was required to "articulate" or to "establish" a legitimate reason and concluded that petitioner did neither. The district court also rejected the reasons petitioner advanced in a fashion specifically authorized by *Bur-*

dine; it found that they were "unworthy of credence" (*id.* at 256). Moreover, the district court may well have considered petitioner's explanations to be efforts to negate elements of the Commission's prima facie case, and there is no dispute that the district court placed on the Commission the burden of proving its prima facie case.

While the courts below explicitly rejected the explanations petitioner offered at trial and on appeal, petitioner has now searched the record and found other possible explanations for its actions; it attempts to construct a *Burdine* violation from the fact that these explanations were not specifically addressed below. The court of appeals and the district court did, however, implicitly reject these explanations (to the extent, if any, that they were put in issue), and in any event petitioner failed properly to articulate them in the way *Burdine* requires.

ARGUMENT

I. PETITIONER'S OFFER OF A JOB WITHOUT SENIORITY, AT A TIME WHEN THE APPLICANTS IT HAD UNLAWFULLY REFUSED TO HIRE HAD FOUND AND ACCUMULATED SENIORITY IN OTHER JOBS, DID NOT TERMINATE PETITIONER'S LIABILITY FOR BACK PAY

Victims of employment discrimination are entitled to back pay "as a matter of course" (*Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 420 (1975)). A district court's decision to award back pay is therefore to be accorded great deference (see *id.* at 421-422), especially because Congress " 'intended to give the courts wide discretion [in] exercising their equitable powers to fashion the most complete relief possible' " for violations of Title VII (*id.* at 421,

quoting 118 Cong. Rec. 7186 (1972) (remarks of Sen. Williams)).

In this case, the district court determined that in order to provide complete relief to Gaddis and Starr, it would deduct their General Motors earnings from their back pay awards but would not cut off those awards at July 1973. The court of appeals affirmed the district court's decision and agreed with its reason: requiring the back pay awards to be cut off would have presented Gaddis and Starr with a Hobson's choice between forfeiting their right to further back pay and giving up the seniority they had earned by working at General Motors—and would have earned at Ford, but for petitioner's discrimination.

Petitioner and amicus never address this reason for the decision below; they never explain how placing victims of employment discrimination in such a predicament is consistent with the purposes of Title VII. Instead, petitioner mischaracterizes the court of appeals' holding, saying that the court established a blanket rule that no employer can ever reduce a back pay award unless it includes retroactive seniority and accrued back pay in a job offer to a claimant.[7] Petitioner and amicus then contend for a

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[7] Petitioner's assertion that the court of appeals' decision requires employers to offer accrued back pay in order to toll a back pay award (Pet. Br. 13-15 & n.12) is obviously incorrect. Neither the court of appeals nor the district court faulted Ford for failing to offer back pay to Gaddis and Starr. Petitioner attaches great significance to the court of appeals' citation to two cases which may suggest that an employer must offer both back pay and retroactive seniority. See Pet. App. A-35 to A-36, citing *Comancho* v. *Colorado Technical College, Inc.*, 590 F.2d 887 (10th Cir. 1979), and *Jurinko* v. *Edwin L. Wiegand Co.*, 477 F.2d 1038 (3d Cir.), vacated, 414 U.S. 970 (1973). But the court of appeals specifically explained why it was citing these decisions—to show

blanket rule of their own—that an unconditional offer of employment without restoration of seniority rights should cut off a back pay award even to claimants like Gaddis and Starr. Neither the reasons for back pay awards under Title VII nor the law governing such awards under other statutes supports petitioner's contentions.

A. Petitioner's Offer of Employment Did Not End the Impact of Its Discrimination, and Therefore Did Not Automatically Terminate Its Liability for Back Pay

Petitioner and amicus rely on a principle, developed under the National Labor Relations Act, that an employer is not liable for back pay that accrues after the point at which it unconditionally offers full reinstatement to the wronged employee. It has never been established that this principle governs Title VII remedies.[8] We will assume arguendo that this prin-

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that there was no conflict because the circuits involved would reach the same result as it did in the case of Gaddis and Starr. Pet. App. A-35 to A-38. At no point did the court endorse all the reasoning of these decisions.

As we explain (see page 23, *infra*), it is wholly logical to require that an offer of reinstatement include seniority up to the date of reinstatement but not to require that it include accrued back pay.

[8] The remedial provisions of Title VII were modeled on those of the National Labor Relations Act, and principles developed under the NLRA should generally guide courts in designing Title VII remedies. See, *e.g.*, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 366-367 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 768-770 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419 & n.11, 420 & n.12 (1975); 110 Cong. Rec. 7266-7267 (1964) (remarks of Sen. Ellender). But the Court has said that "[i]f victims of racial discrimination are under Title VII to be treated differently *and awarded less protection* than victims of unfair labor practice discrimination under the

ciple does apply in the Title VII context; but even under the NLRA, if an employer offers terms and conditions of employment that are less favorable than those the employee would have received but for the discrimination, the employer has not offered full reinstatement and therefore does not terminate its further liability for back pay.[9]

If Ford had not discriminated against Gaddis and Starr, they would have had two years' seniority with Ford in July 1973. Because Ford's offer did not include that seniority, it did not toll their back pay awards, even if the NLRA principle applies to this case.

1. As petitioner appears to recognize, the reason for permitting an unconditional offer of reinstatement to cut off a back pay award is that such an offer "end[s]" the "discriminatory impact of" the employer's action (*Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1321

NLRA, some persuasive justification for such disparate treatment should appear" (*Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 775 n.34; emphasis added). (Amicus curiae Equal Employment Advisory Council quotes this passage at page 11 of its brief but omits the italicized phrase.) The Court has never ruled that employers who violate the NLRA and employers who engage in discrimination on the basis of race or sex must be given the same opportunities to remedy their unlawful acts.

For the most part, the NLRA cases involve unlawful discharges. But it is well settled, under both the NLRA and Title VII, that unlawful refusals to hire are to be remedied in the same fashion as unlawful discharges. See *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 768-769; *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 187 (1941).

[9] In subpoint B, pages 23-29, *infra*, we address the question whether such an offer might reduce a back pay award by enabling the victims of discrimination to mitigate their damages.

(7th Cir. 1974), cert. denied, 425 U.S. 997 (1976), quoted at Pet. Br. 26). If the employer offers to put the employee in a position in which he will not continue to suffer the effects of the employer's unlawful act, there is ordinarily no reason for the employer to continue to incur liability for back pay. The employer remains liable for injury done to the claimant before it offered reinstatement, but its liability is tolled by the offer because the claimant is not further injured after that point; by ensuring that the victim of discrimination will suffer no further injury, the employer becomes entitled to an assurance that he will face no further liability.[10]

Ford's offer to Gaddis and Starr did not, of course, end the impact of its discrimination. If they had accepted that offer, they would have continued to suffer the effects of Ford's refusal to hire them in 1971; solely because of that unlawful act, they would have lacked two years' seniority. This seniority disadvantage would have continued to assert itself long into the future. See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 231 (1963).

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[10] Even under the NLRA this rule is not absolute; just as there are instances in which a reinstatement order is inappropriate, so there are circumstances in which—because of a poisoned work atmosphere or other intangible factors that make it impossible truly to restore the employee to the condition he would have been in if there had been no unlawful act—an employee's refusal to accept an offer of reinstatement will not toll a back pay award. This may be especially likely where the employer has discriminated against the employee on the basis of race or sex. See, *e.g.*, *Taylor* v. *Teletype Corp.*, 648 F.2d 1129, 1139 (8th Cir. 1981), cert. denied, No. 81-512 (Nov. 2, 1981). In such cases, the employee is still under a duty to mitigate damages by seeking employment elsewhere, so the employer will not be subject to unfairly excessive liability. See *ibid.*

Under Ford's collective bargaining agreement, for example, "competitive" seniority determined, among other things, when an employee would be recalled after a layoff (J.A. 1106-1107, 1108-1109) and whether an employee could obtain certain more desirable positions in the warehouse (see J.A. 455, 470, 471, 733). "Noncompetitive" seniority governed the extent to which an employee was covered by group health and life insurance and by petitioner's supplemental unemployment benefits plan (J.A. 104-112, 1084, 1105). In all these respects, Ford's offer to Gaddis and Starr would not have ended the impact of its discriminatory act on them. Solely because of Ford's discrimination, they would have been denied two years' seniority at the Ford plant, and as a result they would have lost health, life and unemployment insurance benefits and would have "remain[ed] subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to [competitive] benefits [their] inferiors" (*Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 768 (1976)). Since Ford's offer did not terminate the effect of its discrimination, there is no reason for it to have automatically terminated the accrual of back pay.

If the wages or fringe benefits of Ford's warehouse jobs had increased between 1971 and 1973, we assume that petitioner would concede that it could not toll the back pay award unless it offered a position at the 1973 rate; and if all those hired by petitioner received routine promotions after two years, reinstatement would have consisted of offering Gaddis and Starr the job to which they would have been promoted. This is the established rule followed by the NLRB. See, *e.g.*, *Golden State Bottling Co.* v. *NLRB*, 467 F.2d 164, 166 (9th Cir. 1972), aff'd, 414 U.S. 168

(1973).[11] There is no reason to distinguish between wages and fringe benefits on the one hand and the noncompetitive and "overriding[ly] importan[t]" (*Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964)) competitive seniority that Gaddis and Starr were denied on the other. See *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 766-770. Thus Ford's offer in 1973 was no more an offer of full reinstatement, sufficient under the NLRA principle to cut off the back pay award, than it would have been if Ford had offered Gaddis and Starr lower wages than it was paying to the men who were unlawfully hired in their stead.[12]

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[11] Of course, the courts retain some flexibility in structuring such relief. If, for example, an employee who is unlawfully denied a position from which he would have been promoted is unqualified for the higher position (because he was not trained on the job, for example), it would be appropriate to order some other form of compensatory relief (perhaps coupled with suitable training) instead of ordering that the employee be hired at the higher position. See, *e.g.*, *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 772 n.31; *Locke* v. *Kansas City Power & Light Co.*, 660 F.2d 359, 368-369 (8th Cir. 1981).

[12] Amicus curiae Equal Employment Advisory Council appears to recognize this, for it takes the more extreme view that "an offer of reinstatement (or of initial employment) is sufficient to cut-off the further accrual of back pay if it places the alleged victim in the position held or sought *as of the date of the alleged discrimination*" (Am. Br. 16; emphasis in original). Thus, in amicus's view, in 1973 Ford could have terminated its liability for back pay by offering Gaddis and Starr an entry-level position at the wage and benefit levels in force in 1971, even if every other employee in the warehouse was, by 1973, being paid more; Gaddis and Starr would have had to accept that offer even if doing so meant quitting a job that paid more. This approach is subject to the same

The incorrectness of petitioner's position becomes clear if one considers what the remedial decree would have provided if Gaddis and Starr had *accepted* the July 1973 offer. In order to "make [them] whole for injuries suffered on account of [the] unlawful employment discrimination" (*Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 418), that decree would have compensated them for losses they suffered after July 1973 because of their lack of seniority. If their lack of two years' seniority caused them to be laid off, denied health or unemployment benefits, or denied a wage increment, a remedial decree would have compensated them for those losses. Thus, if Gaddis and Starr had accepted the offer in July 1973, Ford would have remained liable to pay for the injuries suffered after that date. Petitioner suggests no reason for believing—and no case under Title VII or the NLRA which indicates—that the rejection of an offer should cut off back pay liability where acceptance would not.

2. Petitioner and amicus cite many cases construing the NLRA, but in none of them did the Board or a court hold that an employer could toll its back

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objections as petitioner's view—it would not terminate the effects of the employer's discrimination, and since acceptance of such an offer would not terminate the employer's back pay liability, there is no reason why rejection of the offer should have that effect (see page 19, *infra*). The result amicus advocates would be flatly inconsistent with NLRA precedents, on which amicus relies almost exclusively (see pages 19-23, *infra*). Moreover, amicus's approach, even more than petitioner's, would encourage employers guilty of discrimination to make offers they knew would be refused, thereby both reducing their back pay liability and denying the victims of their discrimination the opportunity to make themselves whole. See *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 347-349 (1953) (rules governing back pay awards should be designed to reduce danger of manipulation by employer).

pay liability by making an offer that permitted the unlawful act to have a continuing effect on the claimant. To the contrary, it is well established under the NLRA that an offer of reinstatement tolls a back pay award only if it restores the terms and benefits of the claimant's employment—including his seniority—to the condition they would have been in had the employer not acted unlawfully. See, *e.g.*, *Golden State Bottling Co.* v. *NLRB*, *supra*, 467 F.2d at 166; *NLRB* v. *Hilton Mobile Homes*, 387 F.2d 7, 10-11 (8th Cir. 1967); *Mutual Maintenance Service Co.*, 244 N.L.R.B. 211, 217 (1979), enforcement denied on other grounds, 632 F.2d 33, 38-39 (7th Cir. 1980); *Marlene Industries Corp.*, 234 N.L.R.B. 285, 291 (1978); *Moro Motors Ltd.*, 216 N.L.R.B. 192, 193 (1975); *Good Foods Corp.*, 195 N.L.R.B. 418, 419 (1972); *Harvey Carlton*, 143 N.L.R.B. 295, 304 (1963). See also *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 769-770 (citing cases); *Globe Molded Plastics Co.*, 204 N.L.R.B. 1041 (1973).[18] In *Rushton*

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[18] In addition, the court of appeals relied on such Title VII cases as *Claiborne* v. *Illinois Central R.R.*, 583 F.2d 143, 153 (5th Cir. 1978), cert. denied, 442 U.S. 934 (1979). There a railroad discriminatorily assigned blacks to lower-paying positions; then in an effort to reduce its liability, the railroad offered to allow them to transfer to the better-paying "white" positions but apparently stipulated that they would lose their seniority if they did so. The court held that the black employees' refusal to accept the transfer offer did not cut off their right to back pay. See also *United Transportation Union* v. *Norfolk & Western Ry.*, 532 F.2d 336 (4th Cir. 1975), cert. denied, 425 U.S. 934 (1976); *Hairston* v. *McLean Trucking Co.*, 520 F.2d 226 (4th Cir. 1975).

Petitioner attempts to distinguish these cases on the ground that they involved a single employer, not a transfer from one firm to another. The only difference between petitioner and the railroad in *Claiborne*, however, is that the railroad at

& Mercier Woodworking Co., 203 N.L.R.B. 123 (1973), for example, the employer offered discharged claimants reemployment at the conditions, benefits, and compensation to which the employer acknowledged they were entitled, with the provision that the rest of their benefits would be settled by the pending litigation. The Board explicitly rejected the argument that such an offer cut off the employer's back pay liability (*id.* at 127):

> An employer charged with unfair labor practices may, of course, toll backpay by offering to reinstate employees to their former positions or, if the positions are no longer available, to equivalent positions. However, he cannot do so by offering them lesser positions even if he, at the same time, assures them that they will receive in addition whatever they will be awarded as a result of litigation. Such a result would shift the risk of an employer's unfair labor practices to the wronged innocent parties, the discriminatees.

Indeed, petitioner appears not to recognize that under the NLRA, the offer of reinstatement needed to toll a back pay award before relief is ordered is precisely the offer that the Board would order. To escape further liability for back pay, the employer must "discharge[] his remedial obligation" to reinstate the employee (*Oil, Chemical & Atomic Workers* v. *NLRB*, 547 F.2d 598, 601 n.3 (D.C. Cir. 1976),

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least hired blacks, although it then discriminated against them in assignments and compensation; petitioner, by contrast, could find no place in its warehouse for women. In both cases, the victims of discrimination could have accepted the employer's offer only by forfeiting seniority rights they had earned, without being given the seniority credits they would have earned but for the employer's discrimination.

cert. denied, 429 U.S. 1078 (1977). See, *e.g.*, *Wonder Markets, Inc.*, 236 N.L.R.B. 787, 787, 791 (1978), enforced *sub nom. NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 676 (1st Cir. 1979) (offer made during litigation did not "satisf[y] [employer's] obligation to reinstate" wronged employee and therefore did not toll back pay award).[14] Petitioner acknowledges (*e.g.*, Pet. Br. 14, 16), as of course it must, that a reinstatement order under either Title VII or the NLRA will award a claimant the seniority, wages, and other privileges that will "restor[e] * * * the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941); see *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 763-770. Thus the Board has made it clear that a back pay award will not be tolled until the employer who has acted illegally complies with:

> [i]ts legal duty * * * to remedy this wrong * * * [by] reinstat[ing employees] to their former positions. For us to hold that some lesser invitation gave rise to a duty on the part of the em-

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[14] The NLRA cases discussing the principle that an unconditional offer of reinstatement tolls a back pay award often do not distinguish among offers made before or during litigation, offers made to comply with a Board order, and offers made pursuant to a Board order that has been enforced. See, *e.g.*, *Wonder Markets, Inc.*, 249 N.L.R.B. 294 (1980). See also D. McDowell and K. Huhn, *NLRB Remedies for Unfair Labor Practices* 87-88 (1976). In *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 347 (1953), this Court, discussing the same principle, similarly did not distinguish between reinstatement offers made before and after a Board order. Petitioner itself relies (Pet. Br. 24-25; Pet. 18) on *NLRB* v. *Izzi*, 395 F.2d 241 (1st Cir. 1968), which involved an offer of reinstatement made pursuant to an NLRB order (see *id.* at 244).

> ployees to respond favorably to it would jeopardize the effectiveness of our remedies and invite deliberate violation of the law. * * * All discriminatees have an absolute legal right to restoration of their former status and pay * * *.

Hydro-Dredge Accessory Co., 216 N.L.R.B. 138, 139 (1974) (footnote omitted).

Petitioner and amicus repeatedly cite the NLRB's rule that an offer of reinstatement will toll a back pay award even if the offer does not include already accrued back pay. See, *e.g.*, *NLRB* v. *Midwest Hanger Co.*, 550 F.2d 1101, 1103 (8th Cir.), cert. denied, 434 U.S. 830 (1977); *Moro Motors Ltd., supra*, 216 N.L.R.B. at 193. This rule is plainly reasonable, but it does not support petitioner's contention. An employer should be relieved of liability for future injuries if it ensures that there will be no future injuries; it need not also remedy past injuries by granting accrued back pay. Back pay, it might be said, is necessary to remedy the past effects of the unlawful act, while an offer of reinstatement must remedy the future effects. Ford's refusal to give Gaddis and Starr the seniority they would have earned but for its discrimination did not merely fail to rectify a past injury; it ensured that Gaddis and Starr would continue to suffer the effects of discrimination after the date of the offer. For that reason, Ford was properly not absolved of liability after that date.

B. The Refusal To Accept Petitioner's Offer in This Case Was Not an Impermissible Failure to Mitigate Damages

Petitioner principally insists that its July 1973 offer automatically terminated its back pay liability, but it also asserts that the refusal to accept that offer was an unreasonable failure to mitigate damages

(see Pet. Br. 19-20). If this were true, it would be a basis for at least reducing the back pay award. But there is no reason for this Court to question the determination of the district court, affirmed by the court of appeals, that Gaddis and Starr acted reasonably in declining to forfeit their seniority at General Motors in order to accept Ford's offer.

Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(g), presumptively requires courts to award back pay to victims of employment discrimination. *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 420-421. Title VII contains no explicit provision permitting employers to toll a back pay award by offering reinstatement. Instead, Section 706(g) establishes that the traditional doctrine of mitigation of damages applies to back pay awards: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."

This doctrine has historically applied to damage awards, and at an early date this Court applied it to back pay awards under the NLRA. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 117, 198-200 (1941). See also *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). But, as the Court cautioned at that time, a wronged employee's responsibility to mitigate damage cannot be captured in "stereotyped formulas" (313 U.S. at 198). In deciding whether the employee has adequately mitigated damages, a court must consider all the circumstances surrounding the employee's actions. The question is one of reasonableness; the claimant's obligation is only to "do that which a reasonable man would do under the circumstances to limit the amount of the damages" (*Chesapeake & Ohio Ry.* v. *Kelly*, 241 U.S. 485, 489 (1916)). He is not required to take great risks or bear unusual

burdens in order to reduce the liability of the party who has wronged him. See, *e.g.*, *NLRB* v. *Madison Courier, Inc.*, 472 F.2d 1307, 1320-1321 (D.C. Cir. 1972); *NLRB* v. *Mastro Plastics Corp.*, 354 F.2d 170, 179 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966). "[O]nly unjustified refusals to find or accept other employment are penalized under this rule." *Oil, Chemical & Atomic Workers* v. *NLRB*, *supra*, 547 F.2d at 603. A court "may give appropriate weight to a clearly unjustifiable refusal to take desirable new employment" but should not "exert[] coercion against [those] who have been unfairly denied employment" (*Phelps Dodge Corp.* v. *NLRB*, *supra*, 313 U.S. at 199-200). See also *NLRB* v. *Nickey Chevrolet Sales, Inc.*, 493 F.2d 103, 108 (7th Cir.), cert. denied, 419 U.S. 834 (1974); *Heinrich Motors, Inc.* v. *NLRB*, 403 F.2d 145, 148 (2d Cir. 1968); *Florence Printing Co.* v. *NLRB*, 376 F.2d 216, 220-221 (4th Cir. 1967); *NLRB* v. *Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966); *Lloyd's Ornamental & Steel Fabricators, Inc.*, 211 N.L.R.B. 217 (1974).

It is also well established under the NLRA, and has been consistently held under Title VII, that once a victim of discrimination shows he is entitled to back pay the party who acted unlawfully bears the burden of showing why a failure to mitigate damages should reduce the award. See, *e.g.*, *United States* v. *Lee Way Motor Freight, Inc.*, 625 F.2d 918, 937-938 (10th Cir. 1979) (Title VII); *Sias* v. *City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978) (Title VII); *Sprogis* v. *United Air Lines, Inc.*, 517 F.2d 387, 392 (7th Cir. 1975) (Title VII); *NLRB* v. *Midwest Hanger Co.*, *supra*, 550 F.2d at 1105-1106; *Marlene Industries Corp.* v. *NLRB*, 440 F.2d 673, 674 (6th Cir. 1971); *NLRB* v. *Arduini Manu-*

facturing Corp., 394 F.2d 420, 423 (1st Cir. 1968); *NLRB* v. *Miami Coca-Cola Bottling Co.*, *supra*, 360 F.2d at 575. Moreover, this Court has said that the purpose of the duty to mitigate back pay awards under the NLRA is "not so much the minimization of damages as the healthy policy of promoting production and employment." *Phelps Dodge Corp.* v. *NLRB*, *supra*, 313 U.S. at 200. Finally, the NLRB ordinarily does not require an employee to mitigate damages by accepting less than full reinstatement from the employer who wrongfully discharged him:

> It would be anomalous indeed for this Board to hold * * * that an employer must offer a discriminatee his former job where it still exists, in order to comply with its reinstatement obligation, while finding that the discriminatee nevertheless must accept an offer of another job which is not even substantially equivalent in order to mitigate lost wages * * *.

Wonder Markets, Inc., *supra*, 249 N.L.R.B. at 294-295. See, *e.g.*, *Hydro-Dredge Accessory Co.*, *supra*; *Harvey Carlton*, *supra*, 143 N.L.R.B. at 304; *Lykes Bros., Inc.*, 128 N.L.R.B. 606, 608 (1960). When Congress modeled the remedial provisions of Title VII on the NLRA, and included a specific requirement that claimants mitigate damages, it undoubtedly intended that these well-established principles be applied to Title VII back pay awards.

These principles refute petitioner's suggestions that Gaddis's and Starr's refusals of the July 1973 offers were unreasonable failures to mitigate damages that should reduce or eliminate their back pay claims. The offer was made by the employer who had discriminated against them. The district court's decision was in no sense inconsistent with the "policy of promot-

ing production and employment"; Gaddis and Starr had sought employment after Ford refused to hire them, were working, and merely declined to exchange one job for another.

Petitioner does not even argue that Gaddis's and Starr's decision not to forgo their accumulated General Motors seniority was in some sense irrational or unreasonable, and plainly it was not. The drafters of Title VII recognized the extraordinary importance of seniority rights to employees. See, *e.g.*, 110 Cong. Rec. 15893 (1964) (remarks of Rep. McCulloch); 110 Cong. Rec. 6564 (1964) (remarks of Sen. Kuchel). See generally *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 766-768; Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1604-1605 (1969). This solicitude for seniority rights is reflected in Section 703(h), 42 U.S.C. 2000e-2(h). See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 348-356 (1977). Seniority rights must, of course, sometimes yield to the central purposes of Title VII. See *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 774-775, 778-779. But it would be anomalous to accept petitioner's view that the remedial provisions of Title VII—which were specifically designed to afford victims of discrimination the most complete relief possible, in order both to make them whole and to discourage discrimination (see *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 417-421)—should be interpreted in a way that would place pressure on victims of discrimination to sacrifice important seniority rights solely in order to save money for a party who has discriminated.

The district court was free to consider other factors as well in deciding whether Gaddis and Starr acted unreasonably in preserving their seniority rights. It could have considered, for example, the fact that because petitioner had discriminated there were no other women working in the warehouse, and the manager specifically warned Gaddis and Starr that they might be harassed and treated with hostility (see App. 72; page 4, note 2, *supra*). See *Tomkins* v. *Public Service Electric & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); *Barnes* v. *Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Gray* v. *Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976).[15] The district court might also have taken into account the difficulty Gaddis and Starr encountered when they attempted to clarify the offer. See page 5, *supra*.

Especially when a district court decides not to reduce back pay because it believes the victims of discrimination acted reasonably in not accepting employment from the discriminator, there is excellent reason for a reviewing court to "recogniz[e] that the trial court will often have the keener appreciation of those facts and circumstances peculiar to [the] particular case[]" (*Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 421-422). The district court's determination that Gaddis and Starr acted reasonably when they declined Ford's offer (in favor of retaining their employment at General Motors) was plainly a

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[15] Petitioner asserts (Pet. Br. 4 n.3) that Smith, Gaddis, and Starr were the first women ever to apply for a warehouse job. But "[a] consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection." *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 365.

sound exercise of its discretion; that determination was affirmed by the court of appeals, and there is no reason for this Court to overturn it.

C. None of the Policies of Title VII Requires That Back Pay Liability Be Terminated in the Circumstances Presented by This Case.

It is a central policy of Title VII that back pay awards be full and complete, in order to make the victims whole and to give those who would discriminate an "incentive to shun practices of dubious legality" (*Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 417). A court awarding back pay under Title VII "'* * * has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future'" (*id.* at 418, quoting *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965)).

Petitioner contends, however, that other policies dictate that back pay should not have been awarded to Gaddis and Starr in this case. Following the dissenting judge in the court of appeals, petitioner urges (Pet. Br. 15-18; see Pet. App. A-92, A-102; Am. Br. 25 n.13) that unless an offer of employment without seniority tolls a back pay award, the seniority rights of other employees will be impaired and collective bargaining agreements violated.[16] This argument fails for several reasons.

First, the court of appeals' approach is likely to be far less devastating to incumbents' seniority rights than petitioner's theory. An employer who is willing unconditionally to reinstate a claimant is likely to

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[16] Petitioner does not demonstrate—or even assert—that *its* collective bargaining agreement precluded such an offer.

make an offer soon after the alleged discriminatory act, so that he can reduce his potential back pay liability to a minimum. The court of appeals' approach strongly encourages such an employer to offer seniority credit to the claimant. By contrast, petitioner's view, if accepted, would give an employer no incentive to offer retroactive seniority until he is ordered to do so, and such an order may not be entered until many years after the discriminatory act. Thus petitioner's approach is almost certain substantially to delay the grant of retroactive seniority in a significant number of cases. The longer an award of constructive seniority is delayed, of course, the greater its impact on the expectations of incumbents.

More fundamentally, petitioner and other employers are free to negotiate collective bargaining agreements that permit them to offer full reinstatement, including seniority rights, to individuals they believe they have discriminated against. See generally *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979). If petitioner has not negotiated such an agreement, then it is in precisely the same position as any other defendant whose ability to settle a claim, to give the plaintiff an opportunity to mitigate damages, or otherwise favorably to affect its litigating position is restricted by a contract with a third party. Certainly Title VII does not require that the victims of petitioner's discrimination be forced to accept an offer of less than full reinstatement, and thus be further disadvantaged, because petitioner has voluntarily agreed—presumably in return for some concession from the union—to limit its flexibility in making hiring decisions.[17]

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[17] Petitioner emphasizes (*e.g.*, Pet. Br. 15) that Gaddis and Starr never explicitly asked for seniority credits when Ford

Petitioner also asserts that the approach adopted by the court of appeals will discourage the voluntary settlement of discrimination claims. This assertion appears to rest on the premise that under the court of appeals' decision, only an offer of reinstatement with accrued back pay will toll a back pay award. See Pet. Br. 13-15, 18-19; Am. Br. 24-25. This premise is plainly incorrect. See pages 13-14, note 7, *supra*.

Moreover, as petitioner repeatedly emphasizes, this case concerns unconditional offers, not settlement offers; the question is when an employer, by the unilateral act of making such an offer, can escape future back pay liability. Consequently, there is no basis for predicting that the outcome of this case will make settlements either more or less frequent. Even if an employer could never escape any liability by a unilateral offer of employment or any other unilateral act, Title VII claimants would still have an incentive

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made its July 1973 job offer. Petitioner never asserts, however, that it would have included retroactive seniority in the offer if it had been asked, or that any failure by Gaddis and Starr to mention seniority rights prejudiced Ford in some way. Any such assertion would be flatly inconsistent with Ford's suggestion—also unsubstantiated—that its collective bargaining agreement precluded it from making such an offer.

In any event, Gaddis and Starr attempted to clarify the offer but were unable to do so (see pages 4-5, *supra*); Gaddis, it appears, was unable even to talk to the manager, and Starr had difficulty in doing so. The manager acknowledged in his testimony that when Starr finally did reach him, she gave him reason to be aware of her concerns about leaving her General Motors job. See App. 16 ("I kind of recall that she said that she had employment, was working for General Motors or maybe she was laid off or something. She did refer to General Motors. I thought at the time that she was employed.").

to settle, for the same reason that other litigants have an incentive to settle—they may otherwise lose the case and receive nothing. To the extent an employer can escape liability unilaterally and cheaply, settlements are likely to be more favorable to the employer and less favorable to the claimant; but there is no reason to believe that they will be more frequent. In any event, it is always possible to speculate that weakening the negotiating position of one party will increase the frequency of settlements. That is not a sufficient reason to adopt an otherwise unjustified rule.

II. THE COURTS BELOW DID NOT PLACE AN IMPROPER BURDEN OF PROOF ON PETITIONER

The district court found that Ford refused to hire Gaddis and Starr, and "never seriously considered" Smith's application, because they were women (Pet. App. A-158, A-167 to A-168). The court of appeals reviewed the evidence (*id.* at A-12 to A-21) and upheld the district court's finding as not clearly erroneous.

Petitioner no longer contends that there was insufficient evidence to support the district court's findings. It does assert, however, that the district court and the court of appeals allocated the burden of proof in a way that is inconsistent with *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). This contention rests on two bases—certain language in the lower courts' opinions that, according to petitioner, required it to prove by a preponderance of the evidence legitimate reasons for rejecting the women's applications; and the fact that the courts below did not *explicitly* reject certain possible explanations that petitioner now advances—but did not

properly articulate in the district court—for its refusals to hire the women. Neither basis is substantial.

1. The Commission showed that Gaddis, Starr, and Smith applied for positions at petitioner's warehouse, that they were qualified for those positions, that they were never seriously considered for those positions, and that the positions were filled by male applicants. The Commission also introduced other evidence that petitioner intentionally discriminated against women —the statements of the warehouse manager and the receptionist (see pages 3-4 & note 2, *supra*); petitioner's failure ever to have employed a woman at the warehouse, a statistical disparity that "is often a telltale sign of purposeful discrimination" (*International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 340 n.20; see *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 579-580 (1978)); and the irregularities in petitioner's hiring practices, including its use of criteria—such as how an applicant would "fit in"—that virtually invited discrimination (see page 4, *supra*). Petitioner's response at trial was that Smith never applied for a warehouse position in 1971 and that all the available positions had been filled by the time Gaddis and Starr applied.

a. In answer to Smith's claim, petitioner offered the testimony of its warehouse manager and one of the several receptionists employed during the relevant period (see J.A. 74; Pet. App. A-123) that Smith had not applied for a position in 1971. Petitioner also asserted that it had no 1971 application from Smith in its files. Smith, however, testified that she did apply in April and June of 1971, and she explained how she remembered the dates (Pet. App. A-17 to A-18). The Commission showed that petitioner had no policy of retaining applications for more than one year (*id.* at

A-18). Petitioner further asserted that if Smith did apply in 1971, she had not made it clear that she was seeking a warehouse position; but Smith testified that she applied for a position in "my line of work," which she identified as "[s]tockroom or shipping"—a description that, as the court of appeals noted, closely fit the Ford warehouse job (*id.* at A-20 to A-21 n.4).[18]

The district court found that Smith applied for a warehouse job at Ford in 1971, and that "[e]ven though she applied before at least one man who was subsequently hired into the warehouse and although she was qualified to be employed in the warehouse, her application was never seriously considered because she is a woman" (Pet. App. A-157 to A-158). The court of appeals, noting that the question turned on whether Smith's testimony could be credited, deferred to the district court's evaluation of the witnesses' demeanor and held that its finding was not clearly erroneous (*id.* at A-17 to A-21 & n.4).

b. Petitioner acknowledged that Gaddis and Starr applied for positions in the warehouse in 1971 and acknowledged that the warehouse was not at full strength at the time they applied. But the warehouse manager testified repeatedly that male applicants had already been hired to fill the vacancies (App. 30, 32-38; J.A. 503-504):

> Q. What jobs did Ms. Gaddis and Ms. Starr apply for, Mr. Miller?

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[18] The district court found, and it is not disputed, that (Pet. App. A-155):

> New employees in the [Ford] warehouse begin as general warehousemen or as "picker-packers." The[y] * * * "pick" ordered parts from their storage and "pack" them for shipment.

A. Jobs in the warehouse. That was their application. That's what they asked for, jobs in the warehouse.

Q. Were there jobs open at the time?

A. No, sir.

* * * * *

Q. Do you remember women applying when there was a job opening available?

A. No, sir, I do not.

* * * * *

Q. As I understood your testimony * * *, you hired or received applications dated July 21, 1971, from Ms. Gaddis and Ms. Starr. Did you recall whether or not in fact you had hired or made arrangements for starting dates to begin of any of the three men [who were hired instead of Gaddis, Starr, and Smith]?

A. I believe I had already hired [them] prior to July 21.

Two of the men who were hired testified that they had not been offered jobs by July 21, and their employment records were consistent with this testimony (see Pet. App. A-15 to A-16, A-159 to A-160). The district court accordingly entered an explicit finding that "[a]t least two of the men employed in August [1971] —Coe and Blanchard—were offered their jobs *after* Gaddis and Starr applied" (*id.* at A-160; emphasis in original). The court of appeals upheld this finding, also, as not clearly erroneous (*id.* at A-16; footnote omitted):

> Obviously, the district court compared the testimony of the warehouse manager with the testimony of Blanchard and Coe and found the recollections of Blanchard and Coe more persuasive. Credibility determinations are the province of the district judge, and, in light of this evi-

dence, we do not find his conclusions clearly erroneous.

c. Nonetheless, petitioner contends that the court of appeals placed an improper burden of proof upon it. Petitioner relies principally on the court of appeals' reference, in an introductory discussion, to petitioner's "burden of proving a legitimate, nondiscriminatory reason for hiring the three men instead of Gaddis, Starr, and Smith" (Pet. App. A-14). Petitioner asserts that under *Burdine* it had only to articulate, not prove, such a reason. But the court of appeals squarely addressed the distinction between articulating and proving a legitimate reason (Pet. App. A-21 to A-22 n.5):

> Ford argues that the district court placed an impermissibly heavy burden upon it. According to Ford, the district court required it to "establish" or prove that it had not discriminated against the three women. * * * Ford contends [that it is] require[d] only [to] * * * "articulate" a legitimate nondiscriminatory reason for choosing the men instead of Gaddis, Starr, and [Smith].
>
> In this case, Ford neither "articulated" nor "established" a legitimate nondiscriminatory reason for hiring the men, since the district court found that the facts did not coincide with Ford's representations. Ford insisted that the other women had not applied when the men were hired. The district court determined the truth to be that the women had applied beforehand. In this situation, Ford was left with no defense to the prima facie case of discrimination.

This discussion, specifically addressing the precise point raised by petitioner, makes it clear that the court

of appeals' affirmance was not based on a view that petitioner was required to prove (as opposed to simply articulating) a nondiscriminatory reason. In light of this specific resolution of the issue, the court of appeals' casual reference to a "burden of proving," contained in a background discussion that may well have been written before the decision in *Burdine*,[19] is plainly not a ground for reversal. "[W]ords such as 'articulate,' 'show,' and 'prove,' may have more or less similar meanings depending upon the context in which they are used * * *." *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24, 25 (1978). Cf. *Furnco Construction Corp.* v. *Waters*, *supra*, 438 U.S. at 577 ("[T]he burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race.").

The district court also rejected petitioner's explanations in a fashion specifically envisaged by *Burdine*; it found that the "proffered explanation[s were] unworthy of credence" (450 U.S. at 256). But petitioner seizes upon (Pet. Br. 34-35) the district court's statement that petitioner "did not establish a legitimate, nondiscriminatory reason for its failure to hire the three women in August, 1971" (Pet. App. A-168). This statement was not made in connection with the district court's conclusions that petitioner's explanations were not credible, and in any event the term "establish," in context, may simply mean that Ford failed to sustain its explanations in the face of the claimants' attacks on them. See *Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. at 255 n.10. Consequently, there is no reason to believe

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[19] The court of appeals' lengthy opinion was issued approximately two weeks after *Burdine* was decided.

that the district court's straightforward credibility judgments rested on the premise that petitioner was required to prove its contentions by a preponderance of the evidence. The law in the Fourth Circuit at the time appears to have been in accord with what this Court subsequently held in *Burdine*. See *Nance* v. *Union Carbide Corp.*, 540 F.2d 718, 726-727 (1976), vacated on other grounds, 431 U.S. 952 (1977). Moreover, petitioner had an opportunity to clarify the burden that the district court had imposed on it when it moved in that court to amend the findings of fact. Its motion made no mention of burden of proof issues (J.A. 73-76).

More important, it seems likely that the district court regarded the issues concerning whether Smith applied and whether there were openings for Gaddis and Starr as part of the Commission's prima facie case—which the court of course required the Commission to prove (see Pet. App. A-167 ("proof of discrimination"))—rather than as part of Ford's defense. The district court held that "[a]s to [Gaddis, Starr, and Smith], all the elements set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 * * * (1973), have been established" (Pet. App. A-167). *McDonnell Douglas* noted that in general a claimant establishes a prima facie case by showing (411 U.S. at 802; footnote omitted):

> (i) that he belongs to a [group protected by Title VII]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Petitioner's answer to Smith's claim plainly was not a "reason for [her] rejection" (*McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U.S. at 802; see *Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. at 259) but an attempt to negate the second element of her prima facie case. Similarly, Ford's answer to Gaddis's and Starr's claims appears to be an effort to negate the second and fourth elements of their prima facie cases by showing that it was not seeking applicants when or after they applied. Petitioner does not contend that the district court placed an insufficient burden of proof on the Commission to establish a prima facie case. Consequently, the district court's holding that the Commission established, on behalf of the three women, a prima facie case of the sort described in *McDonnell Douglas*[20] may itself have been a determination that petitioner's contentions had been rebutted by a preponderance of the evidence. To the extent that Ford attempted only to prevent the Commission from establishing a prima facie case, and failed to do so, the district court's views about how it might have overcome a prima facie case are immaterial.

2. Petitioner now asserts that its true reason for rejecting Gaddis and Starr was that it gave a strict preference to applicants who applied first. If a prior

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[20] In *Furnco Construction Corp.* v. *Waters*, *supra*, 438 U.S. at 575-577, the Court indicated that statistical or other evidence such as was presented here can in appropriate circumstances be used to establish a prima facie case, in lieu of the particular showing in *McDonnell Douglas* that after rejecting a minority applicant the employer kept the position open and continued to seek persons with that applicant's qualifications. A similar point is made in the government's pending petition for a writ of certiorari in *United States Postal Service Board of Governors* v. *Aikens*, No. 81-1044 (filed Dec. 4, 1981), at 11 n.7.

applicant was qualified, petitioner now says, it would hire him for a vacancy without even considering the qualifications of a subsequent applicant. Pet. Br. 38. Since Gaddis and Starr applied after the two men hired in their place, petitioner now asserts that this reason explains its action.

Even though petitioner did not properly articulate this explanation in the courts below, the district court and the court of appeals rejected it—not because they misunderstood the proper allocation of burdens of proof and production, but because they did not believe it explained the refusal to hire Gaddis and Starr. The district court and the court of appeals found that petitioner's hiring procedures were substantially more flexible than petitioner now suggests; the courts recognized that petitioner took into account a variety of criteria other than minimal qualifications and the date of the application (Pet. App. A-155 to A-157). In fact, the district court's principal finding was that petitioner's hiring practices were irregular, subjective, and variable (*id.* at A-155 to A-156). The district court expressly found that petitioner did not rigidly accept the first qualified applicants but instead selected for interviews "what [the manager] consider[ed] to be a sufficient number of applications by qualified candidates" (*id.* at A-157). In selecting this "sufficient number," the manager sometimes, although not always (*id.* at A-156), took prior applicants first, but the number interviewed exceeded the number of openings, for only the interviewees judged to be "best suited for employment" were hired (*id.* at 157).

This is consistent with the manager's testimony quoted by petitioner (Pet. Br. 32; see App. 35); the manager stated that he interviewed "a sufficient number of people," and acknowledged that he might interview, for example, two people for one opening.

In other testimony, the manager confirmed that prior qualified applicants were not automatically hired if they were qualified (J.A. 499, 501):

> If I had one job, I would look at the oldest applications that I had * * *. I reviewed the applications I had, selected a candidate whom I thought, candidate or candidates whom I thought would fit the position, call them for interviews. Subsequent to the interviewing, I would make a selection from the people I interviewed.
>
> * * * * *
>
> When there is an opening, I consider background (work), experience, physical limitations, age (legal age), and handwriting. I then select the applicant I feel is best suited for the position.

The manager made other references to considering several applications together and selecting among them on bases other than the time of application (see, *e.g.*, J.A. 514-515). The manager's successor, who stated that he followed the same procedures, testified that they consisted of reviewing all the applications filed in the previous six months whenever a vacancy occurred, and selecting applicants to be interviewed from that pool (J.A. 392, 400-401, 1011; App. 14-15, 73, 75-76).

Thus the courts below had ample basis for rejecting, as they did, the explanation that prior applicants were always preferred. The courts did not treat this proffered explanation as explicitly as they did petitioner's assertion that the positions were filled when Gaddis and Starr applied, but that is because the explanation that applications were considered in strict chronological order was never properly articulated at trial. The manager's testimony only hinted at such an explanation; no other testimony stated it; and in

its motion to amend the findings of fact petitioner did not ask the district court to address this explanation more fully.[21]

In these circumstances, any inexplicitness in the court's opinion is petitioner's responsibility. Under *Burdine*, an employer can "articulate" a reason for a challenged employment action only if it "clearly set[s] forth * * * the reasons for the [claimant's] rejection. The explanation [must] * * * frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate * * * that the proffered reason was not the true reason for the employment decision. * * * [T]he defendant's explanation of its legitimate reasons must be clear and reasonably specific" (450 U.S. at 255-258 (footnotes omitted)). This is not an excessive burden to place on an employer; "more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting" (*Furnco Construction Corp.* v. *Waters*, *supra*, 438 U.S. at 577), and if petitioner had legitimate reasons for its actions, it should have had little difficulty expressing them clearly at trial. Petitioner's unequivocal statements that the men were hired before Gaddis and Starr applied, and its reliance on that explanation, tended to "narrow[] the factual in-

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[21] As late as its reply brief in the court of appeals (pages 10-11), the *only* explanation petitioner was asserting for its failure to hire Gaddis and Starr was that men had already been hired when they applied; petitioner simply attacked the district court's contrary finding. In its principal brief in the court of appeals (pages 13, 16), petitioner referred to the men as "prior applicants with greater experience" but emphasized, as the explanation for its hiring decision, the assertion that they were already hired when Gaddis and Starr applied.

quiry to this issue alone" (*Payne* v. *McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1146 (5th Cir. 1981), petition for cert. pending, No. 81-986 (filed Nov. 25, 1981)), and to focus the courts' attention principally on that issue. Having failed clearly to articulate its reasons at trial, petitioner should not now be permitted to search the record for other possible explanations that may have some support, and to have the judgment below overturned because those explanations (if they were put in issue at all) were only implicitly, not explicitly, rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Petitioner's Reply Brief

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IN THE

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OCTOBER TERM, 1981

FORD MOTOR COMPANY

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF FORD MOTOR COMPANY

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REPLY BRIEF OF FORD MOTOR COMPANY

ARGUMENT

I.

Ford's Unconditional Offers to Hire Gaddis and Starr as Beginning Employees for the Jobs They Had Sought Terminated the Subsequent Accrual of Back Pay.

This case presents the question whether a person who has claimed that he or she was discriminatorily denied a job, but who has not established the validity of the claim, may reject an unconditional offer of that same job without affecting his or her potential entitlement to collect back pay for the time following the offer. Ford contends that the Fourth Circuit erred in holding that such an offer did not end the subsequent accrual

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Ford's disclosure of affiliate companies and subsidiaries, pursuant to Sup. Ct. R. 28.1, appears in its opening Brief at 1, n.1.

of back pay. The EEOC, in its responding brief, constructs its entire argument in opposition on reasoning and case law not pertinent to the issue actually before the Court, thus obscuring the true issue.

A. *The Court and Board Decisions Relied Upon by the EEOC Do Not Support the Rule Adopted by the Majority Below.*

The Commission urges that the standard by which the adequacy of Ford's job offers to Gaddis and Starr should be judged is that, "[A]n offer of reinstatement tolls a back pay award only if it restores the terms and benefits of the claimant's employment — including his seniority — to the condition they would have been in had the employer not acted unlawfully." [EEOC Brief at 20]. The same point appears in a slightly different guise on the succeeding page of the Commission's brief where Ford is accused of not recognizing that "under the NLRA, the offer of reinstatement needed to toll the back-pay award before relief is ordered is precisely the offer that the Board would order." [EEOC Brief at 21]. Applying this principle to the present case, the Commission reasons that Ford's unconditional job offers did not operate to end the accrual of potential back-pay liability because acceptance of such offers would not "terminate the effect" or "end the impact" of "[Ford's] discrimination." [EEOC Brief at 14-20, 23].

The Commission's argument is fallacious because it equates a *charge* of discrimination with a *final judicial or Board finding* of discrimination. Ford submits that not one of the cases upon which the Commission relies provides any support for the Commission's position or for the rule adopted by the majority below. The Commission's authority is, in fact, consistent with Ford's contention that this Court should reverse the Fourth Circuit's decision as erroneous.

Two of the cases upon which the Commission heavily relies, *Golden State Bottling Co. v. National Labor Relations Board*, 467 F.2d 164 (9th Cir. 1972), and *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), concern the appropriate scope of relief that may be awarded a discrimination claimant *after* a determination that the employer has illegally discriminated. Both cases indicate that retroactive seniority can be an appropriate part of a remedial decree. But that precept certainly does not suggest that an employer who seeks to stop the subsequent accrual of back pay must offer retroactive seniority to a claimant who has only alleged discrimination. In fact, since the award of retroactive seniority in *Franks* appears to have been predicated upon an adjudication of the employer's liability, the reasonable inference to be drawn from the case is that an employer should *not* be required to offer retroactive seniority in the absence of such an adjudication.[1]

The distinction between remedial relief ordered after a final determination of liability and a job offer made pending full litigation of the merits is crucial to any proper analysis of the issue before the Court. Instead of addressing this distinction, the Commission attempts to avoid it by the device of *assuming* that every employer charged with illegal employment discrimination actually engaged in the discrimination alleged. For example, the proposition for which the Commission cites *Golden State* and *Franks* is that an offer of employment will not end the accrual of back pay unless the offer "restores the terms and benefits of the claimant's employment — including

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[1]This Court's recent decision in *Zipes v. Trans World Airlines, Inc.*, 50 U.S.L.W. 4238 (February 24, 1982), again indicates that an award of retroactive seniority becomes appropriate once the employer's liability has been established. The fair implication of this Court's reasoning in *Zipes* is that it would *not* be proper for an employer to be required to provide retroactive seniority in the *absence* of any finding of illegal discrimination.

his seniority — to the condition they would have been in had the employer not acted unlawfully." [EEOC Brief at 20]. The proposition begs the question by assuming that the employer has "acted unlawfully." In embracing this circular argument, the Commission ignores the fundamental principle that an employer should not be presumed guilty of employment discrimination until the discrimination has been proved.

The Commission further confuses the issue by citing a string of cases involving either job offers found to be conditional,[2] or the issue whether employers had offered new jobs, rather than "former jobs," to claimants who had alleged they had been discriminatorily discharged.[3] The case involving the conditional offer stands only for the proposition that discrimination claimants do not forfeit any right to subsequently accruing back pay when they reject job offers that are conditional. *Harvey Carlton,* 143 NLRB 295 (1963). Since Ford's offers were admittedly unconditional [*see* EEOC Brief at 14, 31], and were for the position for which Gaddis and Starr had originally applied, the reasoning of that case suggests that Ford's offers *were* fully adequate.

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[2]*Harvey Carlton,* 143 NLRB 295 (1963).

[3]*National Labor Relations Board v. Hilton Mobile Homes,* 387 F.2d 7 (8th Cir. 1967); *Mutual Maintenance Service Co.,* 244 NLRB 211 (1979), *enforcement denied on other grounds,* 632 F.2d 33 (7th Cir. 1980); *Marlene Industries Corp.,* 234 NLRB 285 (1978); *Moro Motors Ltd.,* 216 NLRB 192 (1975); *Good Foods Corp.,* 195 NLRB 418 (1972); *Globe Molded Plastics Co.,* 204 NLRB 1041 (1973); *Rushton & Mercier Woodworking Co.,* 203 NLRB 123 (1973); *Oil, Chemical & Atomic Workers v. NLRB,* 547 F.2d 598 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1078 (1977); *Wonder Markets, Inc.,* 236 NLRB 787 (1978), *enforced sub nom., National Labor Relations Board v. Eastern Smelting and Refining Corp.,* 598 F.2d 666 (1st Cir. 1979); and *Hydro-Dredge Accessory Co.,* 216 NLRB 138 (1974).

The Commission's reliance on the cases involving the issue whether "new" jobs had been offered to discriminatory discharge claimants is equally misplaced. Those cases apply the principle that an employer may stop the accrual of potential back-pay liability to a discriminatory discharge claimaint by offering unconditionally to reinstate the claimant to his or her former job. The cases do not suggest that a proper offer of "full reinstatement" to a discriminatory discharge claimant need include any seniority other than that the claimant had earned at the date of the discharge that is alleged to have been discriminatory. In fact, in *Globe Molded Plastics Co.*, 204 NLRB 1041 (1973), relied upon by the EEOC, the Board indicated explicity that it found the employer's offer inadequate because "[t]he employer admittedly has refused to credit employees with *seniority for their prior service.*" *Id.* at 1043 (emphasis added).[4] The argument that the Commission constructs is misleading because it assumes, despite such clear indications to the contrary in the cases, that an offer is not one of "reinstatement" unless it includes not only seniority earned up to the date of discharge, but "retroactive seniority" for the period between the discharge and the offer of reinstatement.

Having made this erroneous and unsupported assumption about the meaning of the term "reinstatement," the Commission proceeds to apply the term repeatedly to characterize the offer that it argues Ford should have made to Gaddis and Starr. This, too, is misleading, since Gaddis and Starr are not discriminatory discharge claimants; rather, their claim is that Ford's failure to *hire* them was discriminatory. Because they

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[4]Similarly, in *Moro Motors Ltd.*, 216 NLRB 192 (1975), also relied upon by the Commission, the Board indicated that the seniority to be offered a discriminatory discharge claimant is only *"previously held seniority." Id.* at 193 (emphasis added).

are hiring claimants, there obviously is no "former position" to which they might be "reinstated," and no "previously earned seniority" with which they might be credited.[5] As *Locke v. Kansas City Power & Light Co.*, 660 F.2d 359 (8th Cir. 1981), a case upon which the Commission relies [EEOC Brief at 18, n.11], puts it, in the context of a discriminatory hiring claim, the offer required of the employer is an unconditional offer of "instatement" of the claimant as a *new* employee, to the position for which he or she had applied. 660 F.2d at 366-67. It was just such an offer that Ford made to Gaddis and Starr in the present case.

B. *The Fourth Circuit's Rule Requires Employers Who Wish to Stop the Accrual of Potential Back Pay Liability to Surrender Their Rights to Defend Discrimination Claims and to Injure Innocent Third Parties.*

Ford contends that one of the fundamental problems with the rule adopted by the majority below is that the rule requires an employer wishing to stop the subsequent accrual of back pay to surrender any meaningful right to contest a claimant's allegations.[6] [*See* Ford Brief at 14-15, 20, 23]. In *Moro Motors Ltd.*, 216 NLRB 192 (1974), one of the cases to which the Commission looks for support and upon which Ford, too, has relied [Ford Brief at 23], the Board addressed the significance of this principle:

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[5]Ford does not suggest that decisions involving offers to reinstate discriminatory *discharge* claimants are not relevant to the present case [*see* Ford Brief at 22-26].

[6]Judge Hoffman raised the same objection to the majority's rule in his dissent below, pointing out that the majority's rule requires the employer to "give up his right to defend" discrimination claims [A-95, 104-06].

> [W]ere a respondent required to offer to an employee, allegedly discharged for discriminatory reasons, reinstatement *with accrued back pay*, the Respondent's right to litigate the issue of whether the discharge was lawful would for all practical purposes be nullified.

216 NLRB at 192.

The Commission never directly responds to the argument that the Fourth Circuit's rule requires employers to waive their rights to contest discrimination claims.[7] The Commission's implicit position appears to be that Ford's argument and the Board's reasoning in *Moro Motors* have no applicability here because the court below found expressly only that Ford's offers to Gaddis and Starr should have included retroactive seniority. The Commission does not deny that the weight of authority is overwhelmingly against the rule adopted by the majority below if its decision is read as requiring employers to offer back pay as well as retroactive seniority to discrimination claimants. The Commission attempts, however, to distinguish retroactive seniority from back pay on the ground that the purpose of back pay is to remedy "past effects," while the purpose of retroactive seniority is to remedy "future effects" of the employer's "unlawful act." [EEOC Brief at 23].

The attempted distinction between retroactive seniority and back pay is spurious because both items represent what a claimant would have earned between the date of a proven discriminatory act and the date of the remedial award. Thus, *both* items of relief remedy the "past effect" of the discrimination, which was to deprive the claimant of the opportunity actually to earn the pay and seniority.

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[7]Nor does the Commission mention the three Board decisions cited by Ford that follow the same line of reasoning as that used in *Moro Motors: Consolidated Freightways*, 253 NLRB No. 137 (1981), *remanded on other grounds*, ___ F.2d ___ (D.C. Cir. 1981); *National Screen Products Co.*, 216 NLRB 192 (1973); and *Reliance Clay Products*, 105 NLRB 135 (1953) [Ford Brief at 23].

Nor can the Commission's contention that the decision below does not require employers to offer back pay to discrimination victims be squared with certain other arguments that the Commission advances. For example, it appears to be a premise of the Commission's reasoning, as it is of the Fourth Circuit's [*See* Ford Brief at 14, n.12], that a job offer to a discrimination claimant is not adequate unless it will "terminate the effects" of the presumed discrimination.[8] [*See, e.g.*, EEOC Brief at 16, 19, n.12]. Surely it follows from that premise that an employer would have to offer both back pay and retroactive seniority. To deny either would be to permit the "effects" of the presumed discrimination to continue.

But even if it were possible to read the Fourth Circuit's opinion as requiring employers to add only retroactive seniority to their unconditional job offers to discrimination claimants, the decision would nevertheless run afoul of the principle that employers who seek to cut off the accrual of potential back pay liability should not be required to waive any right to contest employment discrimination claims. If an employer's offer of retroactive seniority should be accepted, the employer will have given up something that it will be unable to recover even if the claimant later litigates his or her claim and loses. If the employer were to offer such retroactive seniority with the provision that the seniority would be "revoked" should the claimant fail to prevail, the offer would almost certainly be open to attack as "conditional," and even if such a revocation of retroactive seniority were possible after a finding for the employer, the employer would still lose the value of seniority benefits, such as vacation days or insurance benefits, that had already been made available to the claimant.

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[8]This proposition appears to be, in different clothing, the "make-whole" principle that the Commission recently repudiated in its Brief in Opposition [EEOC Brief in Opposition at 8].

Thus, when an employer offers either retroactive seniority, backpay, or both, the employer gives up the right to litigate its defense as to that relief. That result is manifestly unfair.

The better rule is that an employer need offer a discrimination claimant only the job for which the claimant had applied or from which he or she was discharged, without any condition that the claimant waive any right to seek further relief; "[t]he employee can then accept if he wishes and pursue back pay, seniority, or other rights he believes he was denied, through the courts or administrative agencies." [A-104-06 (Hoffman, J., dissenting in part)]. The wisdom of that rule is apparent even from the Commission's brief. The Commission concedes that, had Gaddis and Starr accepted Ford's 1973 offer, they, nevertheless, could have continued to litigate their claim, which, if proved, would have entitled them to a remedial decree including retroactive seniority, in addition to back pay [*see* EEOC Brief at 19]. But if an employer is required to offer retroactive seniority in order to terminate the subsequent accrual of back pay, the employer will necessarily give up something that it could never recover after prevailing on the merits. It is clear, then, that while the Fourth Circuit's rule would require Ford to surrender its right to defend the discrimination claims, the rule that Ford urges should have been applied would have caused Gaddis and Starr to sacrifice nothing. Thus, the Commission's statement elsewhere in its brief that, had the women chosen to accept Ford's offer, the result would have been that "[s]olely because of Ford's discrimination,[9] they would have been denied two years' seniority at the Ford plant" [EEOC Brief at 17], cannot stand. If the women had accepted the offer, they would not have been "denied" anything or forced to give up anything.

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[9]Again, the Commission's assertion misses the real issue in this case because it presumes discrimination although none had been proved when Ford's offers were made.

Moreover, the rule advocated by the Commission would require employers to injure the rights of innocent third parties—those incumbent employees with accrued seniority. That injury, too, could never be remedied in the event that no discrimination were found.

The Commission does not deny that offers of retroactive seniority to discrimination claimants will interfere with the seniority rights of incumbent employees. Instead, the Commission suggests that "the court of appeals' approach is likely to be far less devastating to incumbents' seniority rights than petitioner's theory" because "petitioner's view . . . would give an employer no incentive to offer retroactive seniority until he is ordered to do so . . . ." [EEOC Brief at 29-30]. The delay in offering retroactive seniority, the Commission asserts, will cause the injury to the expectations of the incumbents to be greater [EEOC Brief at 30].

The fundamental fallacy in the Commission's argument is the same one that pervades the Commission's brief: it presumes that all employers who are charged with discrimination are actually guilty of that discrimination and that every claimant will therefore ultimately be able to establish his or her entitlement to retroactive seniority. Of course, all discrimination claims that are litigated and found to be without merit will result in no award of retroactive seniority or any other relief. The Fourth Circuit's rule applies to all claims without distinguishing those that are apparently weak from those that are apparently strong, however. Thus, many of the claimants who would receive job offers with retroactive seniority under the Fourth Circuit's rule might well be unable to establish entitlement to that relief in court, and offers of retroactive seniority to those claimants will result in injuries to the

seniority rights of incumbent employees that would otherwise never occur.[10]

In sum, the rule followed by most Circuits and by the National Labor Relations Board, and which is identical to that proposed by Ford and by Judge Hoffman, is the fairest and most logical one from every point of view. The rule compels neither party to waive any right to litigate fully the merits of discrimination claims, and only that rule will protect the rights of incumbent employees pending the conclusion of the litigation. Finally, the rule advocated by Ford would give employers incentive to make job offers to discrimination claimants, and it would give the claimants incentive to accept those offers [*see* Ford Brief at 18-19].

C. *The Mitigation of Damages Principle Requires that a Hiring Discrimination Claimant Accept an Unconditional Offer of the Job for Which the Claimant Had Applied or Lose any Claim to Subsequently Accruing Back Pay.*

Ford has argued that Gaddis and Starr failed to mitigate damages as required by Title VII when they rejected Ford's

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[10]Relying on *United Steelworkers v. Weber*, 443 U.S. 193 (1979), the Commission suggests that employers might protect themselves from liability to such incumbent employees by negotiating collective bargaining agreements that would permit the employers to offer retroactive seniority to claimants "they believe they have discriminated against." [EEOC Brief at 30]. *Weber* indicates that a collective bargaining agreement may validly provide that minority employees will be granted preferential treatment pursuant to an affirmative action plan that is a temporary measure, narrowly drawn so that it will not "unnecessarily trammel the interests of the white employees." 443 U.S. at 208. Contrary to the Commission's argument, however, *Weber* in no way suggests that it would be appropriate for an employer and a union to enter into an agreement that would permit the employer to make self-interested, ad hoc decisions to protect itself from continuing back pay liability by sacrificing the interests of incumbents who are innocent third parties [*see* Ford Brief at 17-18].

unconditional job offer, choosing to remain at GM [Ford Brief at 19-20]. The Commission has responded with the argument that Gaddis and Starr acted "reasonably" in rejecting Ford's job offers [EEOC Brief at 24]. The "reasonableness" test that the Commission has invoked is not applicable, however, where a discrimination claimant has rejected an unconditional offer of the job that is the subject of the claim. Thus, the reasonableness of the women's decisions to remain at GM is not an issue in this case. The cases upon which the Commission relies are distinguishable because they all concern the effect of a claimant's failure to accept a job *other than* the one that was the subject of the claim.[11]

Those cases demonstrate that the job that is the subject of the claim is the *standard* by which the propriety of a claimant's rejection of an offer of interim, or alternative, employment is to be assessed; the greater the similarity, in pay, duties, and location, of the interim job to the job that is the subject of the claim, the greater the likelihood that rejection of the interim job terminates the subsequent accrual of back pay. It follows that the rejection of an offer of the job that is the subject of the claim must end the accrual of back pay. It is irrational to speak of the "reasonableness" of the rejection of the job that is the subject of the claim since that job is the standard by which reasonableness would be measured.

The Fourth Circuit and the Commission have adopted a "backwards" reading of the mitigation of damages cases on

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[11] For example, the Commission quotes the following language from *Oil, Chemical & Atomic Workers v. National Labor Relations Board*, 547 F.2d at 603: "[O]nly unjustified refusals to find or accept *other employment* are penalized under this rule." [EEOC Brief at 25 (emphasis added)]. The words "other employment" in the court's statement of the general rule clearly mean employment other than that from which the claimant was discharged. The court also calls such "other employment," "alternative employment" and "interim employment." 547 F.2d at 605.

which they rely as supporting the use of an alternative job as a standard for measuring the adequacy of an offer of the job that is the subject of the claim. A rejection of such a job offer is "reasonable" under this analysis if the offer does not at least match the terms of the alternative job. Thus, the Fourth Circuit and the Commission conclude that Ford's unconditional job offer to Gaddis and Starr should have included retroactive seniority since it was their accrued seniority that the women found attractive in the GM jobs. The implication of this reasoning is that, had the women favored the GM job because of higher wages or better food in the company cafeteria, it would be those terms of employment, rather than seniority, that Ford would have been required to provide. None of the cases on which the Commission relies, and none of which Ford is aware, supports that result or suggests that the attractiveness of the GM jobs has any relevance to the issue whether Ford's job offer was adequate.[12] The job that Ford offered the claimants was the very one they had sought throughout this litigation; it is illogical and manifestly unfair to impose on Ford the obligation to revise its offer to meet terms, conditions, or benefits that the claimants found more attractive at their interim employment.[13]

Ford submits that its offers stopped the subsequent accrual of back pay, not because the women acted unreasonably in rejecting them, but because the offers gave the women an

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[12]The Commission's incorrect reading of the mitigation of damages cases also leads it to speculate that there might have been other undesirable aspects of the Ford jobs that made Gaddis' and Starr's decisions reasonable [EEOC Brief at 28]. The attractiveness of the jobs Ford offered certainly is not an issue in this case, however, since it is undisputed that the offers were for the very jobs Gaddis and Starr had indicated they wanted.

[13]This unfairness of the Fourth Circuit's ruling is particularly apparent in light of the claimants' failure even to mention to Ford anything about their desire not to lose their GM seniority.[A-106-07 (Hoffman, J., dissenting in part)].

opportunity to *choose* between the Ford jobs for which they had applied and the alternative jobs at GM. Common sense indicates that the women were better off having the chance to make this choice than they would have been had their only option been to continue working at GM. The Fourth Circuit, however, characterizes the choice that Ford's offer presented as "intolerable" [A-34], and the Commission calls it a "Hobson's choice." [EEOC Brief at 13]. The argument that Ford somehow put the women in an undesirable position when it offered them the job for which they had applied is crucial to the reasoning of the Fourth Circuit and the Commission, and the argument is clearly incorrect. It wrongly assumes that the rule advocated by Ford and followed by the Board and most courts "would place pressure on victims of discrimination to sacrifice important seniority rights solely in order to save money for a party who has discriminated." [EEOC Brief at 27]. To the contrary, since the offer was unconditional, its acceptance certainly would not have required any "sacrifice" of seniority to which the women would have become entitled upon proof — and not upon the inappropriate presumption that the Commission again invokes — that Ford was, in fact, "a party who has discriminated" and that Gaddis and Starr were, in fact, "victims" of that discrimination.

II.

The Fourth Circuit Erroneously Imposed on Ford the Burden of Proving its Legitimate, Nondiscriminatory Reasons for its Hiring Decisions.

A. *The Court of Appeals Erred in Holding Ford Failed to Rebut any Prima Facie Showing of Discrimination.*

The Fourth Circuit explicitly stated that, "Ford had the *burden of proving* a legitimate, nondiscriminatory reason for hiring the three men instead of Gaddis, Starr and Smith."

[A-14 (emphasis added)]. Apparently recognizing that the court of appeals' statement is contrary to this Court's holding in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), that an employer need only "articulate" a proper reason for its employment decision to rebut a discrimination claimant's prima facie case, the EEOC attempts to dismiss the statement as "a casual reference" and a "reference in an introductory discussion." [EEOC Brief at 36-37]. The attempt to escape the statement fails, however; the court of appeals' opinion indicates clearly that the assumption that Ford's burden was "one of proof" rather than "production" was a *premise* of the court's reasoning.

The Commission maintains that the true reasoning of the court of appeals can be drawn from a footnote in the opinion [EEOC Brief at 36]. The passage on which the Commission relies in no way suggests, however, that the burden the Fourth Circuit placed on Ford was any less than that of "proving" its rebuttal evidence.

The footnote concerns Ford's evidence that Gaddis and Starr had not yet applied for employment when male applicants were hired. The Commission has itself admitted that Ford succeeded in articulating *that* explanation at trial [EEOC Brief in Opposition at 5-6]. Since the articulation of such a reason rebuts a claimant's prima facie case, *see Burdine*, 450 U.S. at 255, it would appear to be beyond dispute that Ford rebutted the prima facie cases of Gaddis and Starr. But the Commission has now adopted the inconsistent argument that the court of appeals must have applied the proper proof standard since the court stated that Ford "neither 'articulated' or 'established' its rebuttal evidence" and that Ford was thus "left with no defense to the prima facie case of discrimination." [A-21-22, n.5].

It is clear, even from the footnote passage upon which the Commission relies, that the Commission's interpretation of the Fourth Circuit's language is erroneous. The court indicates in the passage that the basis of the conclusion that Ford was "left with no defense" was the assumption that Ford was obligated to convince the trial court of the truth of the explanation. Instead of revealing any recognition of a significant distinction between "articulating" and "establishing" rebuttal evidence, the passage thus shows that the court of appeals thought the two standards to be alike in requiring *proof* of any rebuttal evidence. Therefore, the footnote on which the EEOC relies is fully consistent with the court of appeals' erroneous statement in text that Ford had the burden of proving its rebuttal evidence.[14]

The Commission also contends that the district court's treatment of Ford's explanations for its decisions was "likely" bound up in the conclusion that all of the elements of the prima facie case "ha[d] been established." [EEOC Brief at 38]. The Commission argues that, as a result, the district court's "views about how [Ford] might have overcome a prima facie case are immaterial." [EEOC Brief at 39]. This argument does not

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[14]As Ford pointed out in its opening Brief, the court of appeals' affirmance of the finding in favor of Zettie Smith is also erroneous since it, too, is based on the assumption that Ford was obligated to prove its explanation of its failure to hire her [Ford Brief at 39-40]. Ford articulated its legitimate, nondiscriminatory reason for failing to hire her by eliciting from her, on cross-examination, that it was unclear what job, if any, she had applied for at Ford in 1971. That testimony was as follows: "I didn't indicate what job I applied for. I just, unless it was something in my line of work or whatever." [JA 59]. The Commission's response to Ford's argument is to mischaracterize that testimony as follows: "[b]ut Smith testified that she applied for a position in 'my line of work' which she identified as '[s]tockroom or shipping' . . . ." [EEOC Brief at 34].

succeed because it is fundamentally inconsistent with this Court's reiteration in *Burdine* that a legitimate explanation by the defendant *rebuts* any prima facie case, thereby destroying "the legally mandatory inference of discrimination arising from the plaintiff's initial evidence." 450 U.S. at 255, n.10.

Under the Commission's theory, on the other hand, an employer would never be able to rebut a prima facie case, and thus deflate the "presumption" arising from the prima facie case, if its explanation met or tended to negate any one of the elements of the prima facie case. For example, an employer's evidence of a claimant's very poor performance in a prior, related job would not have the effect of a rebuttal since such evidence tends to negate the claimant's evidence that he or she was "qualified," an element of the prima facie case. Ford submits that this view of the scope of the rebuttal to which an employer is entitled is irreconcilable with *Burdine*.

B. *Ford Adequately Articulated its Explanation that it Failed to Consider the Applications of Gaddis and Starr Because There Were Prior Qualified Male Applicants.*

Contrary to the Commission's protestations, the record leaves no doubt that Ford articulated an explanation of its hiring decisions in addition to the one the Commission has conceded. Ford's warehouse manager who made the hiring decisions in question testified that once he had identified the two males, Blanchard and Coe, as qualified applicants, he did not proceed to any later-filed applications, and thus had no occasion to make any comparison of the males' applications with the claimants'. The warehouse manager gave that testimony, which Ford quoted in its brief before this Court [Ford Brief at 32-34], at the very outset of his examination by Ford's counsel at trial; he plainly established that he was the individual who made the contested decisions; he specified the procedure

he followed for these particular decisions; he explained the basis for his conclusion that the males selected were qualified; and he particularly noted, and repeated, that he had not compared the claimants' applications with the males' applications.

By introducing this testimony, Ford certainly "articulated," as an explanation, that, *even if* Gaddis and Starr had actually applied before the decision to hire the males had been made, Ford's failure to consider the claimants for the two vacant positions was entirely legitimate. Ford in no way abandoned or undermined that explanation when it also provided evidence that the males were actually hired before the women had applied.[15]

The Commission itself appears uncomfortable with its argument that Ford failed to "articulate" the explanation, for after stating the argument, the Commission takes the inconsistent position that the district court and the court of appeals "rejected" the explanation "because they did not believe it

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[15]The EEOC suggests that Ford did not, in the court of appeals, adequately emphasize the explanation that it had legitimately failed to compare the claimants' applications with those of the males, even if the claimants had applied before the hiring decision was made. But Ford, arguing that an erroneous burden had been applied to its rebuttal evidence, urged in its opening brief below that the district court had erred in ignoring that undisputed explanation as well as in finding that the women had applied before the males were hired:

> Although the record is somewhat ambiguous about whether the offers were "offered" or *communicated* to these men before or after July 21, the date Gaddis and Starr applied, it is unmistakably clear from that record that Ford's *decisions* to hire those men were made without benefit of or comparison with the applications of Gaddis and Starr, which were filed only 15 to 26 days prior to the date each man began work. While that fact is unrefuted by the evidence of the findings, it is ignored altogether by the district court.

[Ford's opening brief in the court of appeals at 16 (citation omitted; emphasis in original)].

explained the refusal to hire Gaddis and Starr." [EEOC Brief at 40]. The Commission thus apparently intends to suggest Ford's explanation was a pretext. But because the "pretext" stage is not reached unless the employer has first articulated a legitimate, nondiscriminatory explanation in the "rebuttal" stage, the Commission's argument suggests that Ford *did* articulate the explanation. Ford submits that the Commission's implication that Ford articulated the explanation, and thus made out its rebuttal, was unavoidable in light of the undisputed evidence in the record. The absence of any finding of pretext clearly indicates, however, that pretext played no role in the decision of the district court or the court of appeals [*see* Ford Brief at 36, n.25]. Clearly, the basis of the decisions of both courts below is the erroneous conclusion that Ford never rebutted the claimants' prima facie case.

CONCLUSION

For the reasons stated in its brief and in this reply brief, Ford respectfully requests this Court to vacate the judgment for the EEOC and remand the case with appropriate instructions.

Respectfully submitted,

April 5, 1982

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No. 81-300

IN THE

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Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

This brief amicus curiae of the Equal Employment Advisory Council (EEAC) is respectfully submitted pursuant to the written consent of the parties[1] and in support of the petitioner.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States,

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[1] Their consents have been filed with the Clerk of the Court.

including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of the National Labor Relations Act (29 U.S.C. § 151, *et seq.*) and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*), as well as other equal employment statutes and regulations. As such, they have a direct interest in the issue presented for the Court's consideration in the instant case—i.e., whether the rejection by an alleged employment discrimination claimant of an unconditional offer of employment which does not include retroactive seniority operates to cut off the accrual of further back pay liability.

EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

On July 21, 1971, Judy Gaddis and Rebecca Starr applied for jobs in Ford Motor Company's (hereinafter "Ford") Charlotte, North Carolina parts warehouse. After two men were hired for the positions, Gaddis filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) based on Ford's failure to hire her.

In January 1973, Gaddis and Starr were recalled to positions which they had held at the General Motors

("GM") Charlotte warehouse prior to applying for positions with Ford. In July 1973, Ford offered a warehouse job first to Gaddis and then to Starr. The job was in all respects relevant herein equal to that which they had sought in 1971. Each declined Ford's offer. Gaddis and Starr worked for GM for approximately one year and were both laid off in January 1974 when GM closed its Charlotte plant. On July 21, 1975, after unsuccessful conciliation attempts, EEOC filed suit pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, alleging that Ford had discriminated against Gaddis and Starr and others not relevant to the issues herein.

After a trial on the merits, the District Court for the Western District of North Carolina (McMillan, District Judge), in an opinion unofficially reported in 19 FEP Cases 1288, held that Ford had discriminated against Gaddis and Starr because of their sex by its failure to hire them in 1971. The District Court found that Gaddis and Starr were entitled to back pay from August 1971 until December 30, 1977, the date of its decision. The Court concluded that "[b]ack pay due to Gaddis and Starr shall not be affected by their refusal to accept the single position offered them in July, 1973, inasmuch as neither would have been confronted by that decision and its implications had both been hired in August, 1971." 19 FEP Cases at 1292 (citation omitted).

The Fourth Circuit affirmed the District Court conclusion that Ford had discriminated against Gaddis and Starr in 1971 because of their sex and by a two-to-one decision (Judge Walter E. Hoffman, Senior District Judge sitting by designation, dissenting), reported at 645 F.2d 183, held that the District Court correctly refused to cut off the accrual of back pay when Gaddis and Starr declined Ford's offer of employment in 1973. The court of appeals relied upon prior decisions of the Fourth and other Circuits which it interpreted as hold-

ing "under Title VII that victims of discrimination need not accept job offers which include a loss of seniority in order to preserve their back pay rights." 645 F.2d at 192.

Judge Hoffman, relying on a substantial body of National Labor Relations Act ("N.L.R.A.")[2] and Title VII cases, concluded in his dissenting opinion that "[a]n unconditional offer of reinstatement that does not demand that the employee surrender his back pay or other claims is enough: the employer need not volunteer back pay or give up his rights to defend against those claims." 645 F.2d at 205. Judge Hoffman went on to state that:

> Just as the above [N.L.R.A.] cases do not demand that an employer include back pay in his offer, so no NLRA or Title VII cases require that an offer of initial employment to be valid to cut off back pay, include retroactive seniority to the date of the initial refusal to hire, as is held here by the majority.

Id. (footnote omitted).

Judge Hoffman, after discussing the cases cited by the majority, concluded that:

> It is clear that what this Court has demanded is protection in a reinstatement or promotion offer for seniority *already earned* by employees of a defendant company. The distinction between those cases and the one at hand is clear: here the applicants were denied initial employment, had never worked for Ford before except on a temporary basis, and thus had no seniority rights "accrued" that they were being asked to "forfeit."

Id., at 206 (emphasis added)

Finally, Judge Hoffman summarized his rationale for cutting off back pay upon an unconditional offer of employment:

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[2] 29 U.S.C. § 151, *et seq.*

> The theory behind an offer of employment, whether under NLRA or Title VII, is the same: a job comparable to the one denied the applicant—or from which the employee was fired or to which he was refused promotion—must be offered to him, without any encumbering conditions that would force him to give up certain rights. The employee can then accept if he wishes and pursue back pay, seniority, or other rights he believes he was denied, through the Courts or administrative agencies. Conversely, the offer does not need to include a surrender by the employer of his right to defend against such claims. If the employee rejects that unconditional offer, his right to back pay is cut off. Here, Gaddis and Starr rejected unconditional offers of the same jobs for which they had applied. Those offers did not need to—and did not—include a grant of back pay or retroactive seniority, but, on the other hand, were not conditioned on the surrender by Gaddis or Starr of their rights to pursue those claims. . . Therefore, the offers were valid and their rejection by Gaddis and Starr cut off back pay and reinstatement rights.

Id., at 207.

SUMMARY OF ARGUMENT

The decision of the Fourth Circuit holding that an offer of employment to an alleged victim of hiring discrimination does not cut off an employer's back pay liability is contrary to a long-standing line of decisions under the N.L.R.A. (whose remedial provision provides the model for Title VII's back pay provision), as well as under Title VII and other federal nondiscrimination statutes. In addition, substantial policy reasons exist for tolling an employer's back pay liability upon an unconditional offer of employment to an alleged victim of discrimination.

Section 706(g), the back pay provision of Title VII, was expressly modeled on § 10(c) of the N.L.R.A., the back pay provision under that Act. *Albemarle Paper Company v. Moody*, 422 U.S. 405, 419, 422 n. 16 (1975).

Accordingly, this Court has looked to decisions under the N.L.R.A. in order to determine the scope and nature of the remedies available under § 706(g). *Albemarle Paper Company v. Moody*, 422 U.S. at 419-20; *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 769-70 (1976); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 366 (1977). If victims of discrimination under Title VII are to be treated differently than victims of unfair labor practice discrimination under the N.L.R.A., persuasive justification for such difference in treatment must appear. *Franks*, 424 U.S. at 774 n. 34. No such justification exists herein.

Decisions of the National Labor Relations Board ("Board") have long held that an offer of reinstatement to an alleged victim of discrimination must be for the same or similar job, cannot require the employee to relinquish the right to seek back pay or other appropriate relief and cannot be conditioned on the employee's agreement to abandon unfair labor practice charges against the employer. Such an offer must also include such seniority as was "accrued" or "previously held" with the employer in order to place the claimant in the position which he or she held at the time of the alleged discrimination. *National Screen Products Co.*, 147 N.L.R.B. 746 (1964); *Moro Motors, Ltd.*, 216 N.L.R.B. 192 (1975). It need not, however, include additional or retroactive seniority.

This Court has recognized the importance of reconciling the remedies available in the "twin areas" of discriminatory hiring and discharge. *Franks*, 424 U.S. at 768-69. Accordingly, there is no reason in law or policy to apply a different rule to instances of alleged hiring discrimination than to instances of discharge. In each case, an unconditional offer of employment, with the seniority "accrued" or "previously held" with the employer, places the claimant in the position held or sought at the time of the alleged discrimination without re-

quiring the claimant to give up the right to seek further relief administratively or through the courts, and without requiring the employer to give up its right to contest the legality of the discharge or failure to hire.

The courts of appeals, in cases reviewing decisions of the Board, have uniformly adopted the rule that an unconditional offer of reinstatement tolls the back pay liability of the employer. In addition, cases decided under Title VII and other federal nondiscrimination statutes have tolled the back pay liability of an employer upon an unconditional offer of employment. The decisions relied upon by the Fourth Circuit herein do not support its decision, since they either involved offers that would have required the employee to give up "accrued" or "previously held" seniority or were decided contrary to long-standing Board decisions that no offer of back pay need accompany an offer of reinstatement in order to toll back pay.

The decisions of the Board have sought to strike a balance between the right of the employee to be compensated and the right of the employer to contest the legality of a discharge or hiring decision. A decision by this Court that an unconditional offer of employment tolls back pay will further important labor law policies by reconciling the remedies available under the N.L.R.A. with those available under Title VII.

If the decision of the Fourth Circuit is upheld, the policy of Title VII favoring voluntary resolution of employment discrimination disputes will be undermined, since employers will be reluctant to make offers of employment if they must include essentially all remedial possibilities for which they could potentially be found liable after a fully completed Title VII proceeding. Finally, a rule cutting off back pay liability upon an unconditional offer is consistent with the provision of § 706(g) that an employee must attempt to mitigate damages, since the decision whether to accept such an offer rests entirely with the employee.

ARGUMENT

THE REJECTION BY AN ALLEGED EMPLOYMENT DISCRIMINATION CLAIMANT OF AN UNCONDITIONAL OFFER OF EMPLOYMENT IS SUFFICIENT TO CUT OFF THE ACCRUAL OF FURTHER BACK PAY LIABILITY, EVEN IF THE OFFER DOES NOT PROVIDE FOR RETROACTIVE SENIORITY

A. Since the Remedial Provision of Title VII Is Derived from the National Labor Relations Act, the Remedies Available Under the Two Acts Should be Interpreted Consistently

This Court has on a number of occasions discussed the relationship between § 706(g)[3] of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(g),

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[3] Section 706(g) of Title VII provides:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an *unlawful employment practice* charged in the complaint, the court *may enjoin* the respondent from engaging in such unlawful employment practice, *and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay* (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title" (emphasis added).

and § 10(c)[4] of the N.L.R.A., 29 U.S.C. § 160(c). Thus, this Court has observed that "[t]he backpay provision [§ 706(g)] was expressly modeled on the backpay provision of the National Labor Relations Act." *Albemarle Paper Company v. Moody*, 422 U.S. 405, 419 (1975) (footnote omitted). *Accord, id.* at 422 n. 16; *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 769, 774 and n. 34 (1976); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 366 (1977). As discussed fully in part B below, prevailing Board and court precedent under the N.L.R.A. indicate that Ford's unconditional offer was sufficient to toll its backpay obligation to the discriminatees.

That § 10(c) of the N.L.R.A. provided the model for § 706(g) is fully supported by the legislative history of the 1964 Civil Rights Act. Both Senators Clark and Case in their interpretive memorandum on Title VII and Senator Humphrey, in commenting on what was to become § 706(g), stated that "[t]his relief is similar to that available under the National Labor Relations Act in connection with unfair labor practices, 29 U.S.C. § 160(b)." 110 CONG. REC. 7214 (1964) (interpretive memorandum by Senators Clark and Case); *id.*, at 6549 (remarks of Senator Humphrey).

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[4] Section 10(c) provides in pertinent part:

> (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such *unfair labor practice*, then the board shall state its findings of fact and *shall issue* and cause to be served on such person *an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay*, as will effectuate the policies of this subchapter (emphasis added).

Sections 10(c) and 706(g) have been interpreted as providing that persons found by the National Labor Relations Board or a federal court to have been the victims of an unfair labor practice or unlawful employment discrimination may be awarded back pay, seniority relief and such other relief necessary "to make possible the fashion[ing] [of] the most complete relief possible," *Int'l. Brotherhood of Teamsters*, 431 U.S. at 364, and to make such persons whole for injuries suffered on account of unlawful discrimination. *See N.L.R.B. v. J. H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 263-64 (1969); *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 278 (1956); *Albemarle Paper Company v. Moody*, 422 U.S. at 421; *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. at 771. The award of such "make whole" relief after a Board or court determination of unlawful discrimination is often necessary in order to place the victims of such discrimination in the positions they would have held in the absence of such discrimination. Such relief after a Board or court determination of discrimination serves the statutory purpose of eliminating and correcting for unlawful discrimination in the workplace and is not at issue herein. What is at issue is the extent to which the employer should be compelled to provide such relief in an unconditional employment offer prior to a determination by a court or the Board that illegal discrimination actually has occurred.

It is well established that when Congress adopts the wording of a previously enacted statute, as it did with § 706(g), the adoption carries with it the previous judicial interpretations of the language of the model statute. *See Carolene Products Co. v. United States*, 323 U.S. 18, 26 (1944). It is equally well established that, where possible, there should be an accommodation of the various federal statutes in order to effectuate Congressional objectives. *See, e.g., Boys Markets, Inc. v. Retail Clerk's Union Local 770*, 398 U.S. 235, 249-51 (1970); *Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31, 47 (1942). As this

Court has stated, "the pertinent point is that in utilizing the NLRA as the remedial model for Title VII, reference must be made to actual operation and experience as it has evolved in administrating the Act." *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. at 774 n. 34. Since it can be assumed that the Congress which enacted Title VII was aware of prior decisions of the Board interpreting § 10(c), *Albemarle Paper Company v. Moody*, 422 U.S. at 419-20, this Court has looked to both Board and federal court decisions under the N.L.R.A. in order to determine the scope and nature of the remedies available under § 706(g).[5]

As this Court stated in *Franks*, 424 U.S. at 774 n. 34, "[i]f victims of racial discrimination are under Title VII to be treated differently . . . than victims of unfair labor practice discrimination under the NLRA, some persuasive justification for such disparate treatment should appear." It is submitted that no such "persuasive justification" exists herein and that the Court, as it did in *Albemarle*, *Franks* and *Teamsters* should resolve the issue presented herein in accordance with established Board decisions holding that an unconditional offer of employment tolls the additional accrual of back pay to

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[5] Thus, in *Albemarle*, 422 U.S. at 419-20, the Court relied upon decisions interpreting the backpay provision of the N.L.R.A. in deciding the scope of the availability of back pay under § 706(g). Similarly, in *Franks*, 424 U.S. at 769-70, and in *Teamsters*, 431 U.S. at 366, the Court looked again to decisions under the N.L.R.A. in determining the availability of seniority relief and the relief available to a non-applicant under § 706(g). *See also DiSalvo v. Chamber of Commerce*, 568 F.2d 593 (8th Cir. 1978) (holding that it was appropriate to consider decisions of the Board inasmuch as the back pay provisions of Title VII were modeled on the back pay provisions of the N.L.R.A.); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1377 n. 37 (5th Cir. 1974) ("The relief provisions in Title VII were modelled after a similar provision in the National Labor Relations Act, 29 U.S.C. § 160(c) and thus great weight should be given to interpretations under the latter Act").

an employer. As this Court noted in *Albemarle*, 422 U.S. at 417:

> Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' *Moragne v. States Marine Lines*, 398 U.S. 375, 405, 90 S. Ct. 1772, 1790, 26 L.Ed.2d 339 (1970).

B. Long-Standing Policy Under the National Labor Relations Act, Title VII and Other Federal Nondiscrimination Statutes Establishes That an Unconditional Offer of Employment to a Discrimination Claimant Tolls the Accrual of Additional Back Pay Liability to an Employer

The decision of the Fourth Circuit herein that an unconditional offer of employment to an alleged victim of hiring discrimination does not toll the accrual of additional back pay to an employer unless the offer also includes retroactive seniority is contrary to the long-standing policy of the Board and to decisions rendered under Title VII, 42 U.S.C. § 1981 [6] and the Age Discrimination in Employment Act (A.D.E.A.).[7] The decision of the Fourth Circuit is inconsistent with this Court's practice in previous cases of relying on decisions under the N.L.R.A. to interpret the nature and scope of the relief available under Section 706(g) and would topple the delicate balance which the Board over the years has struck between the rights of alleged victims of discrimination

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[6] 42 U.S.C. § 1981 provides as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other.

[7] 29 U.S.C. § 621, *et seq.*

and the interest of employers in retaining the right to defend against such charges.

The decisions by the Board relating to the tolling of back pay have arisen in situations involving the discharge of an employee for reasons allegedly discriminatory under the N.L.R.A Thus, the Board cases almost uniformly are concerned with offers of reinstatement and not offers of initial employment. As will be set forth below, however, the underlying principle behind the tolling of back pay upon an unconditional offer of reinstatement is equally applicable to an instance of alleged discrimination in hiring. This Court in *Franks v. Bowman Trans. Co.*, 424 U.S. at 768-69, has recognized the importance of reconciling the remedies available to persons alleging discrimination as a result of a discharge with those available upon a failure to hire:

> Settled law dealing with the related 'twin' areas of discriminatory hiring and discharges violative of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. § 151 *et seq.*, provides a persuasive analogy. '[I]t would indeed be surprising if Congress gave a remedy for the one which it denied for the other.' *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187, 61 S. Ct. 845, 849, 85 L.Ed. 1271, 1279 (1941). For Courts to differentiate without justification between the classes of discriminatees 'would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed.' *Id.*, at 188, 191, 61 S. Ct., at 850, 85 L.Ed., at 1280.

In order for an offer of employment to be valid, the Board has held that the offer must be unconditional and not conditioned on the employee's agreement to relinquish the right to seek back pay or other appropriate relief. *See Elling V. Halvorson, Inc.*, 222 N.L.R.B. 534 (1976). Likewise, the offer cannot be conditioned on the employee's agreement to abandon unfair labor practice charges against the employer. *See, e.g., Denver Fire Re-*

porter and Protective Company, Inc., 119 N.L.R.B 1187, 1188 (1957); *N.L.R.B. v. St. Mary's Sewer Pipe Co.*, 146 F.2d 995, 996 (3d Cir. 1945). Finally, in order for an offer to be valid, it must be for essentially the same job which the employee held before he or she was discharged (or the same type of job for which they applied). *See, e.g., A. W. Behney Construction Co.*, 224 N.L.R.B. 1083, 1087 (1976).

It is uncontested herein that Ford offered Gaddis and Starr essentially the same job for which they had applied and that Ford's offer was unconditional, i.e., it was *not* conditioned on dropping their charge of discrimination with the EEOC nor did it in any way restrict their right to seek back pay and other relief either administratively or through the courts. Accordingly, it is clear that Ford's offer of employment to Gaddis and Starr was unconditional and valid.

The Board has consistently held that an unconditional offer of reinstatement tolls the accrual of additional back pay to the employer. *Differential Steel Car Company*, 75 N.L.R.B. 714, 717 (1948), *enforced*, 179 F.2d 241 (6th Cir. 1949); *G.W. Emerson Lumber Company*, 101 N.L.R.B. 1046, 1047 (1952).[8] In *Reliance Clay Products Company*, 105 N.L.R.B. 135 (1953), in holding that an offer of reinstatement cut off additional back pay, the Board stated:

> His refusal to return to work when invited was, as his reply unequivocally shows, based on the mistaken belief that he could lawfully refuse reinstatement unless the Respondent simultaneously abandoned its

[8] For a discussion of remedies available under the N.L.R.A. for unfair labor practices, and the effect of an offer of reinstatement on an employer's back pay liability *see* D. McDowell and K. Huhn, NLRB Remedies for Unfair Labor Practices 81-115 (Labor Relations and Public Policy Series, Report No. 12, Industrial Research Unit, The Wharton School, Univ. of Pennsylvania, 1976).

> defense to the pending unfair labor charges by making him whole as to any *interim wages* he might have lost by reason of the discrimination against him. The Board has consistently held that a discriminatorily discharged employee may not refuse an offer of employment on this ground.

Id., at 137 (citation omitted) (emphasis added).

The Board, in again holding in *National Screen Products Co.*, 147 N.L.R.B. 746 (1964), that an offer of reinstatement tolls the accrual of back pay, elaborated on the rationale for such a rule:

> We do not believe that the fact that the Respondent's offer here did not include an offer of back pay from the date of Suares' discharge warrants our treating that offer as if it were a nullity, as did the Trial Examiner. Indeed, if an employee could lawfully reject a reinstatement offer in circumstances such as these, a respondent employer seeking to mitigate its back pay liability would be compelled to offer to an employee allegedly discharged for discriminatory reasons reinstatement *with accrued back pay*, and thus the employer's right to litigate the issue whether the discharge was unlawful would for all practical purposes be nullified.

Id., at 748 (footnote omitted) (emphasis in original). *See also D'Armigene, Inc.*, 148 N.L.R.B. 2 (1964), *enforced*, 353 F.2d 406 (2d Cir. 1965) ("Requiring the employee to accept an unqualified reinstatement offer without back pay thus mitigates what would otherwise be continuing monetary liability on the part of the employer, while preserving the employee's rights and the Board's interest in ultimate adjudication of the underlying substantive questions involved in the original alleged unfair labor practice." Trial Examiner's Decision at p. 15).

In *Moro Motors, Ltd.*, 216 N.L.R.B. 192 (1975), the Board held that the employer had tendered an unconditional offer of reinstatement to its discharged employee

and stated that after "[h]aving found that Widen's offer was clearly for the job Sylak had previously held, we see no basis for concluding that it did not also encompass *all rights and privileges previously held.*" *Id.*, at 193 (emphasis added). The Board went on to hold that:

> With respect to Widen's failure to mention in his offer that it included back pay, the short of the matter is that the Respondent was under no obligation to do so. Indeed, were a respondent required to offer to an employee, allegedly discharged for discriminatory reasons, reinstatement *with accrued back pay*, the Respondent's right to litigate the issue of whether the discharge was unlawful would for all practical purposes be nullified.

Id. (citation omitted) (emphasis in original).

Two recent decisions of the Board continue the unbroken line of cases holding that an offer of reinstatement tolls the accrual of back pay. In *Consolidated Freightways*, 253 N.L.R.B. No. 137, 106 L.R.R.M. 1076 (1981), the Board stated that "the refusal to include *accrued back pay* in an otherwise valid offer of reinstatement does not render the offer inadequate. The imposition of such a requirement would nullify the right to litigate the lawfulness of the discharge." 106 L.R.R.M. at 1077. In *Burnup & Sims, Inc.*, 256 N.L.R.B. No. 142, 107 L.R.R.M. 1402 (1981), the Board, in holding that a valid offer of reinstatement cut off back pay, stated that "[s]o long as an offer of reinstatement is valid, the fact that the offer is extended to limit back pay liability is irrelevant." 107 L.R.R.M. at 6 n. 6.

The principle that emerges from this long line of Board decisions is that an offer of reinstatement (or of initial employment) is sufficient to cut-off the further accrual of back pay if it places the alleged victim in the position held or sought *as of the date of the alleged discrimination.* The adoption of this principle allows the claimant to assume the position which he or she would

have held absent the alleged discrimination without denying the right of the claimant to seek any further relief necessary to make the claimant whole and without denying the employer its right to defend the legality of the discharge or failure to hire or promote. Since Gaddis and Starr had no "accrued" or "previously held" seniority at Ford, Ford was not required to include in its employment offer any offer of seniority to them in order to toll its back pay liability. At the same time, if a Title VII proceeding establishes a discriminatory hiring violation, retroactive seniority could be ordered by a court. *See Franks v. Bowman Transp. Co.*, 424 U.S. at 762. Again, Board and Title VII precedent are coextensive.

This principle, as distilled from the above line of Board cases, finds unanimous support in decisions of the courts of appeals reviewing decisions of the Board. *See N.L.R.B. v. Izzi*, 395 F.2d 241, 244-45 (1st Cir. 1968); *Kenston Trucking Co., Inc. v. N.L.R.B.*, 544 F.2d 1165, 1167 (2d Circuit 1976); *N.L.R.B. v. Winchester Electronics, Inc.*, 295 F.2d 288, 292 (2d Cir. 1961); *N.L.R.B. v. Huntington Hospital, Inc.*, 550 F.2d 921, 924 (4th Cir. 1977); *N.L.R.B. v. Midwest Hanger Co.*, 550 F.2d 1101, 1103 (8th Cir. 1977); *N.L.R.B. v. Hilton Mobile Homes*, 387 F.2d 7, 11 (8th Cir. 1967); *Polynesian Culture Ctr., Inc. v. N.L.R.B.*, 582 F.2d 467, 475 (9th Cir. 1978); *N.L.R.B. v. Harrah's Club*, 403 F.2d 865, 870-71 (9th Cir. 1968); *Bon Hennings Logging Company v. N.L.R.B.*, 308 F.2d 548, 555 (9th Cir. 1962); *N.L.R.B. v. Ronney & Sons Mfg. Co.*, 206 F.2d 730 (9th Cir. 1953), *cert. denied*, 346 U.S. 937 (1954); *N.L.R.B. v. Betts Baking Company*, 428 F.2d 156, 157, 159 (10th Cir. 1970). *See also N.L.R.B. v. East Texas Steel Castings, Co.*, 255 F.2d 284 (5th Cir. 1958), *enforcing* 116 N.L.R.B. 1336, 1344-45 (1956); *Differential Steel Car Company, supra.* These cases have fully adopted the Board policy of cutting off the back pay liability of an employer upon an offer of reinstatement to a discharged employee.

The decision of the Fourth Circuit in *N.L.R.B. v. Huntington Hospital, Inc.*, 550 F.2d at 921, is particularly instructive, since it adopts the Board practice of tolling the back pay of an employer upon the unconditional offer of reinstatement to a discharged alleged victim of discrimination. The court, after finding that the discharged employee had rejected an offer of reinstatement, held that "[t]he Hospital, having once offered reinstatement, is released from the back pay obligation from the date the offer was rejected. *N.L.R.B. v. Betts Baking Co.*, 428 F.2d 156 (10th Cir. 1970)." *Id.*, 550 F2d at 924.

Although the majority opinion in the instant case did not discuss *Huntington Hospital*, it apparently did not reject the continuing validity of that decision, but rather sought in a footnote to distinguish the substantial body of other similar Board and court of appeals decisions on the basis that the instant case involved allegations of discrimination in hiring rather than reinstatement. 645 F.2d at 193 n. 9. The attempted distinction, however, is not persuasive. There is no logical reason to accord victims of alleged hiring discrimination greater rights than victims of discriminatory discharge. Conversely, there is no reason to deny employers charged with hiring discrimination the opportunity to limit their back pay and still contest the merits of the charges against them, while granting that same opportunity to employers charged with discriminatory discharge. In both situations, the respective rights and interests of the claimants and the employer are the same. Accordingly, the same careful balance of interests long applied in discharge cases is equally appropriate here.

A number of cases decided under Title VII, 42 U.S.C. § 1981 and the A.D.E.A. have recognized the equity in tolling the back pay liability of an employer upon an unconditional offer of employment. In *Waters v. Wisconsin Steel Works of Int. Harvester Co.*, 502 F.2d 1309, 1321 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976),

the Seventh Circuit, in a case brought under Title VII, held that an offer of reemployment, rejected by the claimant, operated to toll the back pay liability of the employer. While the court did not discuss the N.L.R.A. cases, it adopted the same logic that in order to toll its back pay liability an employer need only offer to place the claimant in the position he was in at the time of the alleged discrimination. To require more would have operated to deny the employer the right to contest the allegations of discrimination, a step which the Board has steadfastly refused to take in N.L.R.A. cases. *See Moro Motors, Ltd.*, 216 N.L.R.B. at 193; *National Screen Products Co*, 147 N.L.R.B. at 748.

The Fourth Circuit has recently reaffirmed the propriety of looking to N.L.R.A. case law in deciding the relief available under Title VII. In *Edwards v. Sch. Bd. of Norton, Va.*, 658 F.2d 951, 954 (4th Cir. 1981), after stating that "Congress modeled the back pay provision of Title VII on the antecedent provision of the National Labor Relations Act, 29 U.S.C. § 160(c)," the court went on to state that "[u]nder the Labor Act the back pay period for an unlawfully terminated employee commences with the date of discharge and continues until the employer makes a valid offer of reinstatement." *Id.*, at 1149 (citation omitted). The panel in *Edwards* (two of whom formed the majority in the instant case) did not discuss the apparent inconsistency between its acceptance of Board case law as persuasive precedent in Title VII remedy cases and the result herein which is contrary to Board principles. The unstated reason again would appear to be the court's unpersuasive attempt to distinguish between discharge and hiring cases.[9]

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[9] A number of other cases decided under Title VII, 42 U.S.C. § 1981 and the ADEA provide support for the Board rule of cutting off back pay upon an unconditional offer. *See Blakely v. Chrysler Corporation*, 407 F. Supp. 1227, 1229-30 (E.D. Mo. 1975), *rev'd on other grounds*, 561 F.2d 1282 (8th Cir. 1977) (Holding under Title VII that reinstatement offer without offer of back pay tolls the

The decisions relied upon by the Fourth Circuit herein do not support the court's decision. The cases relied upon are either inapposite or are decided contrary to long-established Board policy which, as indicated above, should control. In *United Trans. U. Loc. No. 974 v. Norfolk & W. Ry.*, 532 F.2d 336, 340 (4th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976) (*U.T.U.*), *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 232 (4th Cir. 1975), and *Claiborne v. Illinois Cent. R.R.*, 583 F.2d 143, 153 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979), acceptance of the positions offered would have required the plaintiffs to forfeit their "accrued" or "previously held" benefits with the offering employer because of another discriminatory aspect of the defendants' employment policies. The court in *Hairston*, 520 F.2d at 232, stated that "[o]nly if the refusal was a free and voluntary act on the part of the employee, not constrained by any discriminatory employer practice or policy, could it be concluded that the employee was barred from claiming back pay." It is undisputed in the instant case that Gaddis' and Starr's

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back pay liability of the employer); *Cofield v. Goldman Sachs & Company*, 364 F. Supp. 1372, 1373 (S.D. N.Y. 1973) (Holding under 42 U.S.C. § 1981 that an offer of employment to a rejected job applicant tolls the back pay liability of the employer); *Coates v. National Cash Register Company*, 433 F. Supp. 655, 662-63 (W.D. Va. 1977) (Instruction to advisory jury in A.D.E.A. case that offer of reinstatement stops the running of back pay). *See also Patterson v. Youngstown Sheet and Tube Co.*, 659 F.2d 736, 740 (7th Cir. 1981) (Back pay liability ended when plaintiffs' class members were afforded the opportunity to become mason apprentices); *Hedrick v. Hercules, Inc.*, —— F.2d ——, 27 FEP Cases 279, 284 (5th Cir. 1981) (Post-judgment offer of reinstatement tolls the continuation of damages for lost wages and benefits); *United States v. United States Steel Corporation*, 520 F.2d 1043, 1058 (5th Cir. 1975) (Refusal of promotion offer cuts off back pay). In addition, commentators discussing Title VII have recognized that "[i]n the individual case, the termination date of back-pay liability is ordinarily the date of an offer of employment, reinstatement, or promotion, whether pursuant to a court decree or voluntarily." B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1240 (1976).

rejections of an unconditional offer of employment, unlike the offers in *U.T.U.*, *Hairston* and *Claiborne*, were "free and voluntary" and that they were not forced to give up any "accrued" or "previously held" rights since they had accrued none with Ford at the time of the offer.

The Fourth Circuit also relied upon *Jurinko v. Edwin L. Wiegand Company*, 477 F.2d 1038, 1047 (3d Cir. 1973), *vacated and remanded*, 414 U.S. 970 (1974) (holding under Title VII that an offer without seniority and back pay did not toll an employer's back pay liability), and *Comacho v. Colorado Electronic Technical College*, 590 F.2d 887, 889 (10th Cir. 1979) (holding under Title VII that a reinstatement offer without back pay did not toll employer's back pay liability). Since this Court expressly vacated the *Jurinko* ruling on the issue of damages, it is not reliable precedent for the Fourth Circuit's decision.[10] In any event, the decision in *Jurinko* provides no support for the Fourth Circuit's decision herein, since the court failed to address the substantial body of Board and court of appeals decisions holding that an offer terminates an employer's back pay liability. Likewise, the Tenth Circuit in *Comacho* failed to address the consistently contrary decisions of the Board or to reconcile its decision with its own prior decision in *N.L.R.B. v. Betts Baking Company*, 428 F.2d at 157, 159, that an unconditional offer of reinstatement cuts off back pay. In any event, it is clear, since *Comacho* was a reinstatement case, that any "accrued" or "previously held" seniority was of necessity included in the offer, and that *Comacho* provides no support for the Fourth Circuit's decision herein.[11]

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[10] For subsequent actions in *Jurinko* by the Third Circuit *see* 497 F.2d 403 (3d Cir. 1974) and 518 F.2d 1214 (3d Cir. 1975).

[11] Similarly, the Eighth Circuit held in *N.L.R.B. v. Hilton Mobile Homes*, 387 F.2d at 11 that "[w]e concur with the Board's decision that an offer of reinstatement which excludes seniority rights is not an offer of substantially equivalent employment, and affirm its

As has been discussed above, the well-reasoned and consistent decisions of the Board, the courts of appeals under the N.L.R.A., and various courts under Title VII, § 1981 and the A.D.E.A. support the proposition urged herein that the Board rule (that offers of unconditional reinstatement toll further back pay to the employer) is equally applicable to offers of initial employment in instances of alleged hiring discrimination. Thus, an unconditional offer to employ an alleged victim of hiring discrimination in the same or similar job originally sought without an accompanying offer of retroactive seniority or back pay, but without restricting the claimant's right to pursue back pay, seniority or other "make-whole" relief either administratively or through the Courts, is sufficient to toll an employer's further back pay liability.

C. Substantial Policies Favoring Voluntary Resolution of Employment Discrimination Disputes and the Mitigation of Damages Support Tolling Back Pay Liability Upon an Unconditional Offer of Employment

It is clear that the Board, in establishing a cut-off of employer back pay upon an offer of employment, has successfully sought to strike a balance between the rights of alleged victims of discrimination to be compensated for their injuries and the right of an employer to contest such charges of discrimination where it believes them to be unwarranted. To require the employee

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finding that Hilton's responsibility for back pay was not terminated by the June 24th letter." The decision, which is relied upon by the Fourth Circuit, 645 F.2d at 193 n. 9, however, is fully consistent with prior decisions of the Board, cited above, and the position urged herein. The offer of the employer in *Hilton Mobile Homes* was to return the discharged employees to the job without restoring to them their "accrued" or "previously held" seniority. To do so, of course, would not have placed them in the position which they were in at the time of the alleged discrimination and the Court correctly declined to toll the employer's back pay liability on the date of such offer.

alleging hiring discrimination to relinquish the right to seek further "make whole" relief as a condition of an offer of employment is contrary to the remedial provisions of the N.L.R.A. and Title VII and has correctly been rejected by the Board and courts interpreting the N.L.R.A. and Title VII. Likewise, an employer should not be required effectively to give up the right to contest discrimination charges by requiring the employer, in order to stop its back pay liability, to offer the discrimination claimant essentially all that that person could receive upon prevailing administratively or in the courts. To require such a rule would frustrate important policies underlying Title VII and the N.L.R.A. and would negatively affect both employers and employees.

This Court in *Albemarle*, 422 U.S. at 417-18, recognized the dual policies underlying Title VII to be the elimination of unlawfully discriminatory practices and "mak-[ing] persons whole for injuries suffered on account of unlawful employment discrimination." It is submitted that the adoption by this Court of a rule cutting off employer back pay liability upon an unconditional offer of employment serves to foster both of these important policies. Just as the economic disincentive of a "reasonably certain prospect of a back pay award," *id.*, at 417, causes employers "to self-examine and self-evaluate their employment practices and to endeavor to eliminate" their effects, *id.*, at 418 (citation omitted), so will the economic incentive of the possible cut off of an employer's back pay liability upon an offer of employment, in conjunction with its interest in correcting unlawful practices, cause the same "self-examination" and "self-evaluation" by an employer.

While back pay and seniority relief are important aspects of the "make whole" relief which this Court has approved under Title VII, the most important aspect of relief to most discrimination claimants will be the opportunity to resume or undertake the jobs they believe

they were discriminatorily denied. It is submitted that a holding by this Court that an offer of employment cuts off further employer liability for back pay will provide the most effective spur to employers to begin the process of "making whole" arguable victims of discrimination. Such a rule operates to the advantage of both employers and employees, and fosters the important national policies of eliminating and correcting for discrimination in the workplace.

On the other hand, if the decision of the Fourth Circuit herein is upheld, the policy of Title VII favoring voluntary resolution of employment discrimination disputes will be drastically undermined. As this Court noted in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), "[c]ooperation and voluntary compliance were selected as the preferred means for achieving this goal [to assure equality of employment opportunities]." *See also United Steelworkers of America v. Weber*, 443 U.S. 193, 204 (1979). If employers are required to accompany offers of employment with seniority and perhaps back pay [12]

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[12] At least one lower court in the Fourth Circuit has interpreted the court of appeals' decision herein as holding "that a person who has been discriminated against does not have to accept an offer of reemployment where back pay has not been offered." *Saunders v. Hercules, Inc.*, 510 F. Supp. 1137, 1142 (W.D. Va. 1981). Although the requirement that *back pay* be included in an offer in order to cut off the employer's back pay liability is not explicitly required by the court of appeals' decision herein, the reasoning of the court and the authorities it relied upon clearly imply that back pay is a required element of the offer. At a minimum, the *Saunders* decision indicates the confusion which the decision herein has engendered in the lower courts and the need for the establishment of a policy under Title VII consistent with decisions of the Board and courts of appeals interpreting the N.L.R.A. Indeed, if the logic of the Fourth Circuit's opinion were to be applied to require the interim payment of allegedly "accrued" back pay, then an employer who prevailed at trial would likely find it difficult, and often impossible, to recoup the amount already paid out.

in order to toll their back pay liability, the incentive to extend such offers is substantially reduced, if not eliminated. Since such a requirement in effect means that an employer must include in its offer virtually everything for which it ultimately could be found liable, there is very little incentive for an employer not to litigate fully all discrimination claims, including the need to hire or reinstate the charging party. In addition, requiring that such an offer include seniority and back pay may have the effect of requiring the employer to grant a remedy that might be found to be inappropriate after trial.[13]

Once an offer of employment has been tendered to an alleged discriminatee, the employer has done all that it can reasonably be required to do without greatly undermining its right and ability to defend against such charges of discrimination. The alleged discriminatee, after receiving an unconditional offer of employment, has it solely within his power to end the discrimination complained of by accepting the offer without prejudice to his pursuit of other "make whole" remedies. Cutting off employer back pay upon the rejection of such an offer is wholly consistent with the mitigation of damages provision of § 706(g) which provides that "amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise available."

The adoption by the lower courts of a "case-by-case" approach to deciding whether an offer of reinstatement

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[13] Also, Judge Hoffman, in his dissenting opinion, correctly recognized that the majority decision would have the inevitable result of affecting the accrued seniority rights of incumbent employees and might expose the employer to potential liability for violating union collective bargaining agreements. 645 F.2d at 206-07. *See Meadows v. Ford Motor Co.*, 510 F.2d 939, 949 (6th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 985 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

(and presumably hiring) cuts off an employer's back pay liability lacks the certainty of application which the Board rule possesses. *See, e.g., Claiborne v. Illinois Cent. R.R.*, 583 F.2d at 153; *Taylor v. Teletype Corporation*, 648 F.2d 1129, 1139 (8th Cir. 1981), *cert. denied*, 27 FEP Cases 56 (November 2, 1981). A "case-by-case" approach leaves the employer and the employee without any rational means of judging the effect which the tender of an offer or the rejection thereof will have on future back pay liability or recovery, whereas the Board rule provides a fixed framework within which such decisions can logically be made. The Board rule, it is submitted, operates ultimately to the advantage of employers and employees alike.

In summary, the adoption by this Court of the Board policy regarding the termination of back pay upon an offer of employment to an alleged victim of discrimination will serve the important purpose of reconciling remedies available under § 10(c) of the N.L.R.A. and § 706(g) of Title VII and will most effectively foster the dual purposes of Title VII by encouraging employers to self-evaluate and correct unlawful practices and to begin the process of making the claimant whole by offering the job which was originally sought.[14]

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[14] Petitioner herein has presented and fully briefed as a second question whether the Fourth Circuit erred in holding that Ford had the burden of proving its legitimate, nondiscriminatory reasons for its hiring decisions. The amicus herein filed an amicus brief in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), on behalf of the petitioner therein. Although the amicus has not briefed the issue of whether the Fourth Circuit's decision conflicts with *Burdine*, it concurs in Ford's arguments that the Fourth Circuit's requirement that Ford had to *prove* a legitimate, nondiscriminatory reason for its failure to hire Gaddis and Starr (and other female applicants) is inconsistent with *Burdine*.

CONCLUSION

For the foregoing reasons, the EEAC respectfully submits that the judgment of the Fourth Circuit herein should be reversed.

Respectfully submitted,

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